85-2054

Supreme Court, U.S.
FILED
JUL 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROSCOE EMORY DEAN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH COURT

ROSCOE E. DEAN, JR.
105 S.E. BROAD STREET
JESUP, GEORGIA 31545
912-427-2264
PRO SE

237 pp

QUESTIONS PRESENTED

1. Should the Chief Judge of the Federal District Court of the Southern District Court of Georgia have disqualified himself, on his own motion, and not have acted on Petitioner's timely motion for reduction or modification of sentence?

2. Should certain members and/or all members of the Eleventh Circuit Court of Appeals have disqualified themselves, on their own motion, and not have acted on Petitioner's timely petition for reconsideration of his suggestion for a rehearing enbanc which was based on new evidence?

PARTIES

The parties of interest are: U. S. Attorney, Savannah, Georgia; Ms. Patty Stembler, U. S. Department of Justice, Washington, D.C.; Solicitor General, Department of Justice, Washington, D.C. 20530, all representing the United States of America. Roscoe Emory Dean, Jr., Petitioner, is also a party of interest.

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[1]The Eleventh Circuit Court of Appeals is bound by precedent of Fifth Circuit Court of Appeals before its inception unless by enbanc decision they change such precedent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.___

ROSCOE EMORY DEAN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Roscoe Emory Dean, Jr., petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The findings of fact and conclusions of law by the district court (Chief Judge) concerning court's disqualification of itself, on its own motion, before any action (denial) was taken on petitioner's motion for reduction or modification of sentence, were unresolved because court (Chief Judge) took no such action to disqualify itself. See Appendix A, pages 1A-4A. The final decision (opinion) of the court of appeals on the matter was unresolved in an order in which it denied Petitioner's petition to reconsider his suggestion for a rehearing enbanc which was based on new evidence. Appendix C, pages 29A-37A.

The findings of fact and conclusion of law by the appeals court concerning certain members and/or all members of the Eleventh Circuit Court of Appeals disqualifying themselves, on their own motion, and not

acting on Petitioner's timely petition to reconsider his suggestion for rehearing enbanc, was unresolved because the Appeal's Court took no such action. The final decision (opinion) of the Court of Appeals on the matter was an order in which it denied Petitioner's petition to reconsider his suggestion for a rehearing enbanc which was based on new evidence. Appendix C, pages 29A-37A.

JURISDICTION

The judgement of the United States Court of Appeals for the Eleventh Circuit was entered on January 17, 1985. Appendix C, pages 14A-22A. A timely petition of a suggestion for an enbanc hearing was denied on February 20, 1985. Appendix C, pages 23A-28A. A timely petition for reconsideration of the suggestion for rehearing enbanc based on new evidence was denied on

April 30, 1985. Appendix C, pages 29A-37A. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The issues raised in this appeal to the Supreme Court were unable to be raised in the petition upon which a judgement was entered on January 17, 1985, or February 20, 1985. The issues presented here were raised in a petition to the Eleventh Circuit based on new evidence upon which a judgement was entered on April 30, 1985. The issues were not raised in the original petition because the government presented briefs and appendixs that were incomplete. Appendix G, pages 190A-215A. In fact, the government ordered no transcripts before presenting its brief and appendix to the Eleventh Circuit in my case. Appendix H, pages 216A-223A. Additionally, it was not until April 19, 1985, that several of the appeal judges made public statements praising the Chief Judge

of the Southern District of Georgia in a personal way, while at the same time, my case was pending before them (Eleventh Circuit) concerning an issue pertaining to the Chief Judge of the Southern District of Georgia. Appendix D, pages 73A-97A specifically. Also Appendix D, 47A-144A. The issues based on the new evidence were presented in a petition starting on March 1, 1985, April 15, 20, 25, and thereafter and were contained in the petition for reconsideration of the suggestion for rehearing enbanc based on new evidence. Petitioner is therefore within the ninety-day time limit in filing his writ of certicrari to the Supreme Court.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Due Process clause of Amendment XIV of the United States Constitution provides: "nor shall any state deprive any persons of life, liberty, or property, without due process of law."

Also 28 U.S.C. 455(a) and 28 U.S.C. 455 (note three) and 28 U.S.C. 453. Also 28 U.S.C. 1254(1). App. J, p. 230 A-232 A.

STATEMENT OF THE CASE

On May 14, 1980, Roscoe Emory Dean, Jr. was convicted of conspiracy with one of his acquaintances to import cocaine, marijuana and methaqualone in a fairy-tale scheme substantially created by State of Georgia government agents (G.B.I.), including a private practicing criminal defense attorney, who advised Dean about the legality of the scheme, and at the same time, he

(attorney) acted as a state government agent (spy) against Dean, and advised the state government (G.B.I.) about the legality of the scheme. There were no actual drugs involved and no real drug organization and no cash passed hands. The so-called enterprise was fabricated by the Georgia Bureau of Investigation and Governor's office. Dean had served as state senator for fourteen (14) years and resigned to run against the incumbent governor for Governor. After coming in second out of a field of six candidates in the Governor's election, Dean's problems with the re-elected incumbent Governor began to evolve.

The Attorney General of Georgia refused to prosecute Dean on the drug conspiracy charges although the Governor requested him to do so twice. The Georgia Bureau of Investigation, with the Governor's blessings, then went to the Federal government to get

the so-called state case prosecuted. Dean was convicted on May 14, 1980, in the Federal District Court in the Southern District of Georgia, Savannah, Georgia. He was sentenced by the federal district court to concurrent five year terms on three counts and fined ten thousand dollars. Dean appealed his conviction to Unit B of the Fifth Circuit Court of Appeals which has now become the Eleventh Circuit Court of Appeals.

On January 22, 1982, the appeals court vacated two of the three counts against Dean and affirmed and remanded the one count back to the federal district court. On April 15, 1982, Dean had sentence reimposed on him. He received the exact same sentence on the one count that he had received previously on all three counts concurrently -- a five year sentence and a ten thousand dollar fine. The original trial and sentencing judge however did not reim-

pose sentence. He had temporarily and voluntarily stepped down from the bench until some unproved allegations, about him, could be cleared up. The Chief Judge of the District Court reimposed sentence on Dean and carried out an administrative function of a ministerial nature. The Chief Judge did not exercise his discretion in the sentencing process but merely reimposed sentence.

After sentence was reimposed on Dean he appealed to the Supreme Court on April 30, 1982. His petition for writ of certiorari was denied on June 1, 1982. Dean began serving his sentence of five years on June 15, 1982. He filed a timely motion for reduction or modification of sentence within one-hundred and twenty days of final judgement and on October 22, 1982, (Appendix A, pages 1A-2A), the Chief Judge of the Southern District of Georgia, denied Dean's motion, without findings of fact or conclusion

of law. On November 15, 1982, (Appendix A, pages 3A-4A), Dean's motion for reconsideration was also denied by the Chief Judge without findings of fact or conclusions of law. On November 17, 1982, Dean filed a Motion for Reconsideration Amendment for Reduction of Sentence which was never acted on by the Chief Judge. As stated before the Chief Judge of the Southern District of Georgia was not Dean's original trial and sentencing judge and was not intimately familiar with the facts and evidence of Dean's case. Appendix E, pages 145A-166A.

On February 1, 1984, Dean filed a motion to correct an illegal sentence. On April 5, 1984 (Appendix B, pages 5A-7A) Dean's original trial and sentencing judge released him from incarceration. (Dean also had pending, at that time, a motion for Reconsideration Amendment for Reduction of Sentence. The Judge's release order is not clear as to

which motion he acted on in releasing Dean). (Dean also filed a motion to disqualify the Chief Judge of the Southern District of Georgia on February 6, 1984 -- to prevent his ruling on either motion -- illegal sentence motion and motion for Reconsideration Amendment for Reduction of Sentence since he failed to disqualify himself on his own motion. The Chief Judge refused to disqualify himself but did not act on either motion -- he allowed the original trial and sentencing judge to do so -- although he (Chief Judge) did rule on and deny Dean's original motion for reduction of sentence and Dean's original Motion for Reconsideration for Reduction of Sentence. Additionally, the Chief Judge failed to respond in his response order to the issue Dean raised in his disqualification motion about the serious and strong implications of the Chief Judge's involvement and intervention into the leg-

islative process concerning the appointment-rejection of his former law partner to the Board of Regents and Dean leading the senate opposition to the nomination). Appendix F, pages 167A-189A.

The government opposed Dean's release and appealed the order releasing him and also filed a mandamus petition. It argued that Dean had not received an illegal sentence -- although there is no assurance that is the motion and grounds that the original trial and sentencing judge released him on. (Appendix B, pages 8A-11A). On June 27, 1984, (Appendix C, pages 12A-13A), the Eleventh Circuit Court of Appeals denied the government's writ of mandamus petition and issued a mandate. On January 17, 1985, (Appendix C, pages 14A-22A), the Eleventh Circuit Court of Appeals also dismissed the government's appeal to the order but granted a new (old) writ of mandamus petition to re-

instate Dean's original sentence -- after it had previously denied such a petition seven months earlier -- and it issued the new (old) writ of mandamus as a mandate also. Dean timely filed a petition of a suggestion for an enbanc hearing which was denied on February 20, 1985. Appendix C, pages 23A-28A. Dean then filed a timely petition for a reconsideration of the suggestion for a rehearing enbanc based on new evidence and it was denied on April 30, 1985. Appendix C, pages 29A-37A. On May 6, 1985, the district court, under mandate, from the Eleventh Circuit Court of Appeals, reinstated Dean's original sentence. Appendix C, pages 38A-39A. On May 16, 1985, Dean began serving the remainder of his original sentence. On May 21, 1985, the Eleventh Circuit denied a motion to recall and stay the mandate pending appeal to the Supreme Court. Appendix C, pages 40A-46A.

REASON FOR GRANTING WRIT

I. SHOULD THE CHIEF JUDGE OF THE FEDERAL DISTRICT COURT OF THE SOUTHERN DISTRICT OF GEORGIA HAVE DISQUALIFIED HIMSELF, ON HIS OWN MOTION, AND NOT HAVE ACTED ON PETITIONER'S TIMELY MOTION FOR REDUCTION OR MODIFICATION OF SENTENCE?

The matter was left unresolved by the Chief Judge of the Southern District of Georgia and by the Eleventh Circuit Court of Appeals. 28 U.S.C. 455(a) states that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned". Also 28 U.S.C. 455 (note three), states that "proper administration of justice requires of judge not only actual impartiality but also appearance of detached impartiality." 28 U.S.C. 453 enumerates the oath that each federal judge takes before performing the duties of his office. It states: "I, do solemnly swear

(or affirm) that I will administer justice without respect to persons, and do equal right to the poor and rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my ability and understanding, agreeably to the constitution and laws of the United States. So help me God." Additionally, the Due Process clause of Amendment XIV of the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law." Due Process among other things means fairness!

A disqualification on the part of the Chief Judge of the Southern District of Georgia, on his own motion, before considering Petitioner's timely motion for reduction or modification of sentence, would not have been an admission that he was biased

or prejudiced against Petitioner, but merely that his disqualification was to enhance the public's confidence in the administration of justice based on the "reasonable man test". In other words, a judge faced with a potential ground for disqualification should consider how his participation might look to the average person on the street. The idea being that disqualification should follow if the "reasonable man", were he to know all the circumstances, might harbor doubts about the judge's impartiality or appearance of detached impartiality.

The bottom line of all the above is this: many of the average people on the street (reasonable man test) in our area of Georgia, knew about the controversy surrounding Petitioner, the Chief Judge of the Southern District of Georgia and his former law partner concerning his law partner's

nomination to the State Board of Regents and later his rejection by the Georgia State Senate with Petitioner as the senate leader of the opposition. They (man on the street) also knew that there were serious and strong implications of the Chief Judge's involvement and intervention into the legislative process concerning the appointment. They had heard Petitioner's radio broadcast as senator implicating the Federal Judge. The "man on the street" knew it then and knows it now! It was the "talk of the town" at the time of the rejection of the nomination and later when the Chief Judge of the Southern District of Georgia assumed control of petitioner's motion for reduction or modification of sentence. If the court so desires verified and certified petitions and affidavits from the average person on the street --"reasonable man" -- in Petitioner's area of Georgia -- can be gathered and sent to

the court. In other words, the "reasonable man" on the street, in Petitioner's area of the state, still harbors doubts about the Chief Judge's impartiality and appearance of detached impartiality when he acted on and denied Petitioner's Motion for Reduction or Modification of Sentence. (Appendix D, pages 47A-144A. All letters to the Eleventh Circuit Court of Appeals were docketed as part of Petitioner's petition.).[2]

The Fifth Circuit in Potashnich v. Port City Construction Company 609 F.2nd. 1101 (5th Cir. 1980) found that the objective standard requires disqualification of a concededly unbiased judge where the judge's former law partner represented a party in a civil law suit and the judge had a passive financial relationship with the attorney.

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[2]See note at bottom of page twenty-six.

II. **SHOULD CERTAIN MEMBERS AND/OR ALL MEMBERS OF THE ELEVENTH CIRCUIT COURT OF APPEALS HAVE DISQUALIFIED THEMSELVES, ON THEIR OWN MOTION, AND NOT HAVE ACTED ON PETITIONER'S TIMELY PETITION FOR RECONSIDERATION OF HIS SUGGESTION FOR A REHEARING ENBANC WHICH WAS BASED ON NEW EVIDENCE?**

The matter was left unresolved by the Eleventh Circuit Court of Appeals. 28 U.S.C. 455(a) and 28 U.S.C. 455 (note three) and 28 U.S.C. 453 denotes and outlines the applicable law to this question. Additionally, the Due Process clause of Amendment XIV of the United States Constitution provides the applicable constitutional provisions since each judge in his oath of office swears or affirms to faithfully and impartially discharge and perform his duties agreeably to the United States Constitution and laws of the United States.

Petitioner in his petition to the Eleventh

Circuit Court of Appeals on April 20, 1985, (Appendix D, 73A-144A), and thereafter, in which he petitioned the court for reconsideration of the suggestion for a rehearing enbanc based on new evidence, raised the issue of certain members of the appeals court making public statements at a public ceremony praising the Chief Judge of the Southern District of Georgia in a personal way, that indicated a close personal relationship that might be perceived as affecting their appearance of detached impartiality, while at the same time, such appeal judges and the entire appeals court had before them Petitioner's petition concerning the Chief Judge's failure to disqualify himself on Petitioner's motion for reduction or modification of sentence. Additionally, Petitioner raised the issue of certain appeal judges making public statements at a public ceremony concerning the Chief Judge of the

Southern District of Georgia, which indicated and implicated the entire membership of the Eleventh Circuit Court of Appeals in attesting to and supporting the personal statements made by the several appeal judges about the district court chief judge and indicated a close personal relationship between all of them (members of appeal court) and the district court Chief Judge that might be perceived as affecting their appearance of detached impartiality concerning Petitioner's petition, then before them, which concerned the issue of the district court's Chief Judge's failure to disqualify himself on Petitioner's motion for reduction or modification of sentence. As stated before, the issue was raised in Petitioner's petition on April 20, 1985 and thereafter in letters which were made a part of the petition and docketed by the appeals court clerk in Petitioner's case then before the appeals

court. Appendix D, pages 47A-144A. Specifically pages 73A-93A.

The bottom line of all of the above is this: many of the average people "on the street" (reasonable man test) in our area of Georgia, knew about the statements of personal praise of the appeal judges implicating the entire appeals court concerning the Chief Judge of the Southern District of Georgia (It was reported on the television and in the newspapers.) and they -- average man on the street -- reasonable man -- also knew that Petitioner's petition concerning the district court's Chief Judge's failure to disqualify himself on Petitioner's motion for reduction or modification of sentence was before the entire appeals court at that time. And the "man on the street" --reasonable man -- also knew about the previous events pertaining to Petitioner and the Chief Judge of the Southern District of

Georgia and his former law partner's nomination rejection to the State Board of Regents with Petitioner as the senate leader of the opposition and Petitioner's radio broadcast (Appendix D, pages 98A-100A) implicating the Chief Judge's intervention into the legislative process concerning the nomination process -- and the "man on the street" -- reasonable man -- still harbors doubts about the district court's Chief Judge's impartiality and appearance of detached impartiality when he failed to disqualify himself on Petitioner's motion for reduction or modification of sentence. It is very logical and probable therefore that the "man on the street" -- "reasonable man" --might well perceive the statements by certain members of the Eleventh Circuit Court, concerning the Chief Judge of the Southern District of Georgia, which implicated ALL members of the Eleventh Circuit Court, as

statements which causes him -- "man on the street" -- "reasonable man" -- to harbor doubts about the impartiality and appearance of detached impartiality of ALL members of the Eleventh Circuit Court -- when they failed to disqualify themselves, on their own motion, concerning Petitioner's petition for reconsideration of his suggestion for a rehearing enbanc which was based on new evidence and contained the issue of the Chief Judge of the Southern District of Georgia failure to disqualify himself on Petitioner's motion for reduction or modification of sentence -- and which questions his (Chief Judge's) impartiality and appearance of detached impartiality.

This case offers an opportunity for the Supreme Court to provide appeals courts and district courts with needed specific direction on when they should disqualify themselves in cases in which their impartiality

and appearance of detached impartiality might be questioned by the "man on the street" -- "reasonable man" -- in accordance with 28 U.S.C. 455(a) and 28 U.S.C. 455 (note three) and 28 U.S.C. 453 as well as the Due Process clause of Amendment XIV of the United States Constitution. Respect for the courts and justice is dependent, to a great extent, upon the conduct of the judges, who are the trustees of our Judicial System! When their impartiality and appearance of detached impartiality might be questioned by the "man on the street" -- "reasonable man" -- for good reason -- and there is no response or a negative response from the Judiciary -- and such effects the life and liberty of a person like the Petitioner -- then such can create an environment which can be conducive to law abiding citizens losing respect for the fairness of the judicial process!

Respectfully submitted,

Roscoe Emory Dean, Jr.
105 S.E. Broad Street
Jesup, Georgia 31545
912-427-2264
Pro Se

July 25, 1985

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[2]Petitioner was not in a position to appeal the denial of his first two timely motions for reduction of sentence, addressed to the district court, under Rule 4(b), Federal Rules of Appellate Procedure, which

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[2]allows ten days from the denial, because technically petitioner still had a motion for Reconsideration Amendment for Reduction of Sentence still pending before the district court, and until a ruling was made on the pending motion by the district court, petitioner did not know if it was a valid motion or not and therefore had no final determination in his reduction of sentence process.

It was not until the Eleventh Circuit Court of Appeals handed down its adverse de-

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[2]cisions of petitioner's cases by panel on January 17, 1985, and the enbanc suggestion denial on February 20, 1985, that petitioner was able to proceed on this point. The court in its adverse panel decision of January 17, 1985, (which was not effective until the enbanc suggestion denial of February 20, 1985), in footnote six, page 19, Appendix I, pages 224A-229A, stated: "Dean has chosen on appeal to treat the district court's order as one granting

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[2]relief under Rule 35(a). In any event we note that the court could not properly have granted relief to Dean under Rule 35(b). The Supreme Court has held that the 120 day time limit contained in Rule 35(b) is jurisdictional." The Eleventh Circuit Court of Appeals then went on to say in the next paragraph: "We also note that the 120 day-limit applies even when the district court purports to reconsider an earlier, timely Rule 35(b) motion" ... "nor is the juris-

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[2]dictional defect cured by styling the subsequent motion as a motion for reconsideration."

It was not until the appeals court handed down its decision with the above language in the footnote that the issue of petitioner's motion for Reconsideration Amendment for Reduction of Sentence, pending before the district court, was adjudicated, for the first time, because the district court had made no such ruling on the motion much

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[2]less given any such reason. As stated above, it was not until the above decision, which became effective on denial of the en-banc suggestion on February 20, 1985, that petitioner could proceed to appeal the denial of his first two timely filed motions for reduction of sentence that had been before the district court. Petitioner did so by filing with the appeals court a petition on March 1, 1985, within ten days, from the enbanc suggestion denial, which complied

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[2]with Rule 4(b), Federal Rules of Appellate Procedure, which allows ten days from denial of a reduction of sentence motion in which to appeal. Appendix G, pages 190A-215A.

Additionally, as stated elsewhere in this petition, Appendix E, pages 145A-166A, the government failed to include in its petition to the Eleventh Circuit Court of Appeals, petitioner's motion for Reconsideration Amendment for Reduction of Sentence

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[2]or refer to it. In fact, it (government) did not order the transcripts before filing its appeal. Appendix H, pages 216A-223A. That is why petitioner raised the matter in his March 1, 1985, petition to the Eleventh Circuit Court of Appeals based on new evidence. Appendix G, pages 190A-215A.

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA : CRIMINAL

V. :

ROSCOE EMORY DEAN, JR. : NO. CR 480-13

U.S. DISTRICT COURT
Southern District of GA.
Filed in office
5:00 p.m.
October 22, 1982
/s/ B. Rowe
Deputy Clerk

O R D E R

The Court having read and considered the Defendant's motion for reduction or modification of sentence, pursuant to Fed.R.Crim.P. 35, as well as the Government's response thereto and the

supplements to each, the said motion is hereby **DENIED.**

SO ORDERED, this 22 day of October, 1982.

/s/ Anthony A. Alaimo

CHIEF JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA : CRIMINAL ACTION
V :
ROSCOE EMORY DEAN, JR. : NO. 480-13

FILED
U. S. DISTRICT COURT
SAVANNAH DIV.
Nov 15 3:14 PM '82
/s/ G. Hendrix
Deputy Clerk
SO. DIST. OF GA.

O R D E R

Upon consideration of the defendant's motion for reconsideration of this Court's denial of his motion to reduce or modify sentence, pursuant to Fed.R.Crim.P. 35, said motion is hereby DENIED.

APPENDIX A

SO ORDERED, this 15th day of November, 1982.

/s/ Anthony A. Alaimo

CHIEF JUDGE, UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
VS.	)	CR480-13
	)	
ROSCOE EMORY DEAN, JR.,	)	
	)	
Defendant	)	

FILED

U.S. DISTRICT COURT

SAVANNAH DIV.

April 5, 1984 3:21 PM

By /s/ R. Stalvey

Deputy Clerk

SO. DIST. OF GA.

A TRUE COPY

Attested

April 5, 1984

By /s/ G. Hendrix

Deputy Clerk

APPENDIX B

O R D E R

Roscoe Emory Dean, Jr. was convicted, after a jury trial in this court, on May 14, 1980. His conviction was substantially affirmed by the Fifth Circuit Court of Appeals Unit B on January 22, 1982.

The defendant has filed a motion to reconsider the denial of his motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

After due consideration thereof, the sentence of confinement heretofore entered is modified to be limited to time already served by the defendant, and he is ordered released instanter. All other provisions of said sentence heretofore rendered are to remain in full force and effect.

SO ORDERED, this 5th day of April, 1984.

APPENDIX B

/s/ B. Avant Edenfield

JUDGE, UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	
	)	
V	)	CR 480-13
	)	
ROSCOE E. DEAN	)	

NOTICE OF APPEAL

Notice is hereby given that the United States of America, Plaintiff-Appellant, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the order and judgment entered April 4, 1984, granting the defendant's motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure releasing the defendant instanter from confinement.

The Clerk of the District Court is hereby directed to transmit immediately

APPENDIX B

a certified copy of this Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit.

This 2nd day of May, 1984.

HINTON R. PIERCE
UNITED STATES ATTORNEY

/s/ Wm. H. McAbee II

William H. McAbee II
Assistant United States Attorney
for
Karen Skrivseth
Attorney for Appellate Section
Criminal Division

APPENDIX B

NO. 84-847

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

IN RE UNITED STATES OF AMERICA,

Petitioner

F I L E D

U.S. Court of Appeals

Eleventh Circuit

June 11, 1984

Spencer D. Mercer

Clerk (stamped)

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

APPENDIX B

PETITION FOR THE UNITED STATES

HINTON R. PIERCE

United States Attorney

Southern District of Georgia

PATTY MERKAMP STEMLER

Attorney

Department of Justice

Washington, D. C. 20530

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8475

IN RE:

UNITED STATES OF AMERICA,

Petitioner.

U.S. COURT OF APPEALS

ELEVENTH CIRCUIT

F I L E D

June 27, 1984

Spencer D. Mercer

Clerk (stamped)

- - - - - - - -

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Georgia

- - - - - - - -

APPENDIX C

Before GODBOLD, Chief Judge, JOHNSON and HENDERSON, Circuit Judges.

B Y T H E C O U R T :

IT IS ORDERED that the petition for writ of mandamus is denied.

APPENDIX C

Eleventh Circuit

OFFICE OF THE CLERK

56 Forsyth Street, N.W.

ATLANTA, GEORGIA 30303

January 17, 1985

SPENCER D. MERCER

CLERK

In Replying, Give Number

Of Case and Names of Parties

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 84-8386

USA v. ROSCOE EMORY DEAN, JR.

(No. CR480-13)

APPENDIX C

The following action has been taken in the above case:

_____ AN EXTENSION OF TIME has been granted to and including

___ for filing appellant's/ petitioner's brief.

___ for filing appellee's/ respondent's brief.

___ for filing reply brief.

___ for filing petition for rehearing.

___ It is specifically understood and agreed by the movant for extension, that the document above will be filed on or before this new date, and further agreed that no additional extension will be requested by the movant.

APPENDIX C

_____ Motion to consolidate granted.

_____ Motion to supplement or correct the record granted.

_____ Motion for leave to file supplemental brief granted.

_____ Motion for leave to file brief *amicus curiae* is granted.

_____ Joint motion as to time for filing briefs is granted.

XXX Order enclosed has been entered.

Patty M. Stempler

Donald E. Wilkes, Jr.

SPENCER D. MERCER, CLERK

By: /s/ Pam Holloway

Deputy Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8386

UNITED STATES OF AMERICA,

Appellant,

v.

ROSCOE EMORY DEAN, JR.,

Appellee.

U.S. COURT OF APPEALS

ELEVENTH CIRCUIT

FILED Jan 17, 1985

SPENCER D. MERCER, CLERK

(stamped)

Appeal from the United States District Court

for the Southern District of Georgia

(January 17, 1985)

APPENDIX C

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

B Y T H E C O U R T :

Upon a motion of the United States to refile its petition for a writ of mandamus, it is ordered that the Clerk is directed to file the notice of appeal and supporting papers, presently docketed as No. 84-8386, as a petition for a writ of mandamus.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8386

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellent,

v.

ROSCOE EMORY DEAN, JR.,

Defendant-Appellee.

Appeal from the United States District Court

for the Southern District of Georgia

No. 85-8035

Non-Argument Calendar

APPENDIX C

IN RE: United States of America,

Petitioner.

On Petition for a Writ of Mandamus
to the United States District Court
for the Southern District of Georgia

(January 17, 1985)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

KRAVITCH, Circuit Judge:

U.S. Court of Appeals
Eleventh Circuit
FILED January 17, 1985
Spencer D. Mercer, Clerk

the scope of its judicial authority, the aggrieved party should be granted the writ almost as a matter of right." Id. 20

We previously have issued writs of mandamus to compel district courts to vacate unauthorized sentence reduction orders. See, e.g., United States v. Norton, 539 F.2d 1082, 1083 (5th Cir.), cert. denied, 429 U.S. 1103 (1976); United States v. Mehrtens, 494 F.2d 1172, 1176 (5th Cir.), cert. denied, 419 U.S. 900 (1974).[21] Upon the authority of these cases, and applying the principles announced in Denson, we conclude that mandamus is the proper remedy in the instant case. We thus grant the government's petition for a writ of mandamus to compel the district court to vacate its order reducing Dean's sentence, and direct that

the writ of mandamus issue.[22]

E. Conclusion

Based on the foregoing discussion, we GRANT (1) Dean's motion to dismiss the government's appeal, and (2) the government's petition for a writ of mandamus to compel the district court to reinstate the defendant's original sentence. The remaining motions are DENIED.

APPEAL DISMISSED; WRIT OF MANDAMUS ORDERED TO ISSUE.

U.S. Court of Appeals
Eleventh Circuit
FILED January 17, 1985
Spencer D. Mercer, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

OFFICE OF THE CLERK

56 Forsyth Street, N.W.

Atlanta, Georgia 30303

February 20, 1985

Spencer D. Mercer

Clerk

In Replying Give Number

of Case and Names of Parties

TO ALL PARTIES LISTED BELOW:

NO. 84-8386 USA v. ROSCOE EMORY DEAN

85-8035 IN RE: USA

APPENDIX C

The enclosed order has this day been entered on petition ( ) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure and Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,
SPENCER D. MERCER, Clerk

By: /s/ Pam Holloway
Deputy Clerk

Patty Mukaup Stemler
Donald E. Wilkes, Jr.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8386

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

ROSCOE EMORY DEAN, JR.,

Defendant-Appellee.

No. 85-8035

IN RE: UNITED STATES OF AMERICA, Petitioner.

- - - - - - - - - - - - -

Appeal from the United States District Court for the Southern District of Georgia

- - - - - - - - - - - - -

APPENDIX C

U.S. Court Of Appeals

Eleventh Circuit

FILED Feb. 20, 1985

Spencer D. Mercer, Clerk

(stamped)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 17, 11 Cir., 1985 ___F.2d___).

(February 20, 1985)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

APPENDIX C

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

APPENDIX C

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch

United States Circuit Judge

REHG-6

(Rev. 6/82)

APPENDIX C

UNITED STATES COURT OF APPEALS

Eleventh Circuit

OFFICE OF THE CLERK

50 Spring Street, S.W.

Atlanta, Georgia 30303-3147

April 30, 1985

SPENCER D. MERCER

Clerk

In Replying Give Number

Of Case and Names of Parties

Henry R. Crumley, Jr., Clerk

U.S. District Court

P.O. Box 8286

Savannah, Georgia 31412

APPENDIX C

No. 84-8386 U.S v. ROSCOE EMORY DEAN, JR.
85-8035 IN RE: USA
(No. CR480-13)

(XX) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 25 Decision in the above case issued as an for the mandate.

( ) The Court having denied the motion for stay of mandate, enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate. See attached notice.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the

APPENDIX C

judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(XX) Copy of the Court's opinion.

(XX) Original record on appeal or review. (36 vols. in 3 boxes)

( ) Original exhibits.

( ) Bill of Costs approved by this Court.

(XX) Order enclosed has been entered.

APPENDIX C

Sincerely,

SPENCER D. MERCER, CLERK

By: /s/ Pam Holloway

Deputy Clerk

Encl.

cc: Patty Merkamp Stemler

Roscoe Emory Dean, Jr.

MDT-1

APPENDIX C

UNITED STATES COURT OF APPEALS

For The Eleventh Circuit

No. 84-8386

Non-Argument Calendar

D.C. Docket No. 480-13

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

ROSCOE EMORY DEAN, JR.,

Defendant-Appellee.

Entered: January 17, 1985

For the Court: Spencer D. Mercer, Clerk

By: /s/ Warren A. Godfrey

Deputy Clerk

ISSUED AS MANDATE: APR 30 1985

- - - - - - - - - -

APPENDIX C

Appeal from the United States District Court for the

Southern District of Georgia

- - - - - - - - - -

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be and the same is hereby, DISMISSED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8386

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ROSCOE EMORY DEAN, JR.,

Defendant-Appellee.

No. 85-8035

IN RE: UNITED STATES OF AMERICA,

Petitioner.

Appeal from the United States District Court for the

Southern District of Georgia

APPENDIX C

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

U.S. COURT OF APPEALS
Eleventh Circuit
FILED
April 30, 1985
SPENCER D. MERCER, CLERK
(stamped)

PER CURIAM:

On January 17, 1985, this court granted the government's petition for a writ of mandamus to compel the district court to reinstate Dean's original sentence. See United States v. Dean, 752 F.2d 535 (11th Cir. 1985). On February 20, 1985, this court entered an order denying Dean's petition for rehearing and suggestion for rehearing en banc.

APPENDIX C

On March 4, 1985, Dean petitioned this court to reconsider his suggestion for rehearing en banc. No member of this panel nor other judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure Eleventh Circuit Rule 26), the petition for reconsideration of Dean's suggestion for rehearing en banc is DENIED.

The mandate in the above-styled case shall hereby issue.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch

United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs	)	CR480-13
	)	
ROSCOE EMORY DEAN, JR.	)	

FILED
U.S. DIST. COURT
SAVANNAH DIV.
May 6 10:50 AM '85
CLERK, /s/ M. Garrett
SO. DIST. OF GA.

O R D E R

Having received the mandate of the Eleventh Circuit Court of Appeals the

APPENDIX C

same is hereby made the judgment of this Court.

So Ordered, this 6th day of May, 1985.

/s/ B. Avant Edenfield

Judge, U.S. District Court

Southern District of Georgia

APPENDIX C

UNITED STATES COURT OF APPEALS

Eleventh Circuit

OFFICE OF THE CLERK

50 Spring Street, S.W.

Atlanta, Georgia 30303-3147

May 21, 1985

SPENCER D. MERCER

Clerk

In Replying Give Number

Of Case and Names of Parties

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

NO. 84-8386 & 85-8035

USA v. ROSCOE EMORY DEAN

APPENDIX C

The following action has been taken in the above case:

XXX The enclosed order has been ENTERED.

_____ AN EXTENSION OF TIME has been granted to and including

___ for filing appellant's/ petitioner's brief.

___ for filing appellee's/ respondent's brief.

___ for filing reply brief.

___ for filing petition for rehearing.

___ This extension is granted subject to the condition that no additional extensions will be requested by the movant and that the specified document will be filed on or before this new date.

APPENDIX C

_____ Motion to consolidate granted.

_____ Motion to supplement or correct the record granted.

Patty Mukaup Stemler

Roscoe Emory Dean, Jr.

SPENCER D. MERCER, CLERK

By: /s/ Pam Holloway

Deputy Clerk

MOT-2

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8386

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

ROSCOE EMORY DEAN, JR.,

Defendant-Appellee.

No. 85-8035

IN RE: UNITED STATES OF AMERICA,

Petitioner.

- - - - - - - - - - - - -

Appeal from the United States District Court for the

Southern District of Georgia

- - - - - - - - - - - - -

APPENDIX C

U.S. COURT OF APPEALS

ELEVENTH CIRCUIT

FILED

MAY 21, 1985

SPENCER D. MERCER, CLERK

(stamped)

O R D E R :

(✓) The motion of Appellee, Roscoe Emory Dean, Jr. for /7 stay ~~XX~~ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellee, Roscoe Emory Dean, Jr. for /7 stay ~~XX~~ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final

APPENDIX C

disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

APPENDIX C

( ) IT IS ORDERED that the motion of ___

_____

for a further stay of the issuance of the mandate is DENIED.

/s/ Phyllis Kravitch

UNITED STATES CIRCUIT JUDGE

MDT-4

(Rev. 6/82)

APPENDIX D

Mr. Spencer Mercer
Clerk of 11th Circuit Court of Appeals
50 Spring Street, S.W.
Atlanta, Georgia 30303-3147

My dear Mr. Mercer:

Please docket the enclosed letter and exhibits, dated April 15, 1985, in my cases #84-8386 and 84-8475 (85-8035).

Enclosed are twenty-one copies of the letter and exhibits to be sent to all twelve active judges of the 11th Circuit Court of Appeals and the court staff. Under the circumstances it might be appropriate to also send a copy of the letter and exhibits to all five senior judges of the court. <u>There are two enclosures for each judge -- the letter and the exhibits.</u>

APPENDIX D

The subject matter of this letter and exhibits is urgent and very serious. The enclosed letter and exhibits are in reply to a response filed by the government on March 22, 1985, pertaining to my two cases. I originally wrote to the court on March 1, 1985, bringing to its attention a very serious matter and new information concerning my cases. The court on March 14, 1985, by letter, directed the government to respond. The enclosed letter and exhibits dated April 15, 1985, contain additional new information about my cases as a response to the government.

Each letter enclosed along with its exhibits, are personally addressed to each individual judge (all seventeen of them). I am sure I can count on your cooperation in seeing that each judge receives his personal letter and exhibits.

APPENDIX D

As I stated to you in my March 1, 1985, letter, I am acting as my own attorney in this matter. Any and all matters relating to my cases should be sent to me at the address below. Thank you for your cooperation.

Faithfully,

/s/ Roscoe Dean, Jr.

Roscoe Dean Jr.
612 Cherry Street
Jesup, Georgia 31545
912-427-2264

April 15, 1985

U.S. Court of Appeals
Eleventh Circuit
Filed April 16, 1985
Spencer D. Mercer, Clerk

APPENDIX D -9-

Excerpt from April 15, 1985
brief to the Eleventh Circuit

We have four seperate issues here about fairness:

A. Chief Judge Alaimo's failure to re-assign my reduction of sentence motion to my trial Judge -- Judge Edenfield. (The record shows that Judge Edenfield was in a position to act on my motion for reduction of sentence a few short weeks after I timely filed it. (His other court actions prove this to be true.) The case of Rice and Mendoza made allowances for a Judge to act on a motion for reduction of sentence after the 120 day time limit. Additionally, Mendoza holds that a defendant should not be penalized because of it. Furthermore, the case of

APPENDIX D

Campbell and Nerren indicate that a Rule 35 motion for reduction of sentence be addressed to the discretion of the trial judge. Judge Edenfield was my trial judge and not Judge Alaimo. The cites on the above cases have been given elsewhere in this letter.

B. Chief Judge Alaimo's failure to disqualify himself on his own motion. (The record shows that a controversy arose that pertained to Judge Alaimo's former law partner and close friend being rejected by the Georgia Senate to a position on the Board of Regents with very strong implications of Judge Alaimo's involvement and intervention into the legislative process concerning the appointment. The controversy assumed major state-wide proportions

APPENDIX D

with me as the senate leader of the opposition to the nomination and the news media devoted a great deal of state-wide attention to the controversy. Judge Alaimo and his very close friend and law partner were constituents of mine since I was the senator from Brunswick. A speech by me was broadcast over a local Brunswick radio station in which I made some strong comments that implicated Judge Alaimo. Judge Alaimo's chambers are located in Brunswick and he was and is the only federal judge located in the county. The above events and controversy were known by many people in our area. The "reasonable man" on the street knew it then and knows it now! It was the "talk of the town" at the time of the rejection of the nomination and later when Judge

APPENDIX D

Alaimo assumed control of my case and the motions that followed. The "reasonable man" on the street, in our area of the state, harbors doubts about Judge Alaimo's impartiality and appearance of detached impartiality in my case. Verified and certified affidavits and petitions from the "average man on the street" -- reasonable man -- can be prepared and sent to the court about the matter if the court so desires. Judge Alaimo should have disqualified himself on his own motion, under 28 U.S.C. 455 (a) and Potashnich vs. Port City Construction Co., 609 F. 2d. 1101 (5th Cir. 1980). (See generally U.S. vs. Phillips, 664 F. 2d. 971 (5th Cir. 1981); Phillips vs. Joint Legislative Committee on Performance and Expenditure Review, [illegible] F. 2 d. 1014 (5th Cir. 1981).

APPENDIX D

C. Judge Alaimo acting on and denying two of my motions for reduction of sentence under the circumstances outlined in Section A and B above. (The record shows that Judge Alaimo had access to a large supplemental report, Exhibit H, (incorporated by reference into my motion for reduction), prepared by a former federal probation officer and expert regarding new information about defendant that was not available at the time he reimposed sentence on defendant. The supplemental report was for the purpose of providing in-depth personal background information on defendant which even the original sentencing judge (Judge Edenfield) indicated he did not have at the time of original sentencing. (Exhibit I, page 25). (Reasons why we did not ask for a continuance at the original

sentencing will be explained later).

The supplemental

of law! The Appeals Court has supervisory power, regardless of rules, time limits or other criteria, that it appears can correct a situation where fairness did not prevail! In Berman vs. U.S. 378 U.S. 530, 12 L ed 2d. 1012, 84 S. CT. 1895 (1964), on page 1016 it states; "Furthermore we have consistently held that once a reviewing court has jurisdiction of one issue of a case (here the reduction of sentence). it may consider questions arising in earlier stages of the case."

Rule Two of the Federal Rules of Criminal Procedure states: "The rules are intended to provide for a just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. "Also in Berman vs. U.S. 378

APPENDIX D

U.S. 530, 12 L ed. 2d 1012, 84 S. CT. 1895, (1964), dissenting opinion of J. Black, joined by Warren, Douglas and Goldberg, page 1013, "This case seems to me to be decided on the premise that it is more important that the Federal Rules of Criminal Procedure be slavishly followed than justice be done. I cannot agree to any such principle and therefore dissent." In Fallen vs. U.S. 378 U.S. 139, 12 L ed 2d 760, 84 S. CT. 1689 (1964), Page 760, Headnote 3. "The Federal Rules of Criminal Procedure are not a rigid code having an inflexible meaning irrespective of the circumstances." In U.S. vs Mendoz 565, F. 2d. 1285, (5th Cir. 1978) on Page 1286 it states: "Though timeliness is important to our jurisprudence, chronometry must not be given absolute dominance over justice, fairness and common sense."

APPENDIX D

I wish to make it abundantly clear to the court that it is not my purpose or intent to malign, hold up to public ridicule or degrade Judge Alaimo by the facts and statements made in this letter to the court about him. A man makes his own record in the court. I am merely presenting the record to the court, to the best of my knowledge and belief, and pointing out to the court the consequences of such a record and how it affects my case and therefore my life and liberty! Proof of the above is demonstrated by an event that took place in the Senate on February 8, 1978, at the time I was still Senator. (Exhibit J) (I was not Senator at the time of my indictment, trial or appeal).

On February 8, 1978, the Senate of Georgia, by an official resolution, which was legally adopted and voted on by the

APPENDIX D

members, condemned and urged the reprimand of Judge Anthony Alaimo by a vote of 42 to 1. The resolution, roll call vote and certification is attached as (Exhibit J). I did not vote on the resolution although I was present in the Senate Chamber at the time. (There were two Senators serving in the Senate at the time with the name Dean. The roll call vote attached shows that Sen. Dean from the 31st Senatorial District voted to condemn and urge the reprimand of Judge Alaimo. The roll call vote further shows that Sen. Dean from the 6th Senatorial District did not vote either way. I was the Senator from the Sixth District at that time.) The reason I did not vote on the resolution was stated in a brief speech I made to the Senate on a point of personal privilege. I stated in essence that: while the resolution may well have merit that I,

as a matter of principle, did not believe that the legislative branch of government should involve itself in the affairs of the judicial or executive branch of government. That I believed in the principle of separation of powers -- "checks and balances"! That Judge Alaimo was a constituent of mine and I was his Senator. I stated that in 1974 the Senate was subjected to what amounted to a "bloodbath" over the nomination and rejection of Judge Alaimo's former law partner with whom he was and is still close friends. That ramifications from that event could still be felt and would continue for years to come. That there were very strong implications, as the Senate already knew, of Judge Alaimo's involvement and intervention into the legislative process concerning his former law partner's nomination. That although I was not questioning the solid

merits of the resolution before the Senate or the honest motives of those who might choose to vote for it, that at the same time, I could not be a party to an action which someone might possibly perceive as a possible retaliation against Judge Alaimo because of past events. That by not voting for or against, the resolution for condemning and urging the reprimand of the judge, I wish to demonstrate that I held no "ill-will" against the judge, his former law partner or anyone! That the matter of the nomination rejection was not a personal matter but one that was based on principle.

In light of the above information, I think it should be clear to members of the Appeal Court that the statements and facts in my letter to the court about Judge Alaimo, his court record and the consequences of such a record and how it affects

my case and therefore my life and liberty, are not for the purpose of maligning, holding up to public ridicule or degrading the Judge.

It should be emphasized to the court that the government in its brief did not address or comment on the issue of Judge Alaimo's impartiality or appearance of detached impartiality before he ruled on my reduction of sentence motion.

If there is a member or members of the 11th Circuit Court of Appeals, who before being appointed, were possibly involved in trying to secure the appointment of Judge Alaimo's former law partner -- not necessarily so much from the standpoint that they knew him or his former law partner well -- but from the standpoint that they might have been friends of the Governor or his group and might have contacted Senators or other

APPENDIX D

people, who contacted Senators, about the appointment, or they might have become involved in other ways -- then I am sure that such a member or members will do the right thing in deciding what to do about disqualification in my case if possible prior circumstances presents any problem for them. Additionally, if there is a member or members of the court, who because of a possible very close personal relationship with Judge Alaimo, might have a problem with the statements, facts and record I present pertaining to Judge Alaimo in my letter -- then I am sure that such a member or members will do the right thing also in deciding what to do about disqualification in my case if such circumstances presents any problems for them. I do not make these statements out of disrespect for the court but because of my respect for it!

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STATE OF GEORGIA

OFFICE OF THE SECRETARY OF THE SENATE

I, Hamilton McWhorter, Jr., Secretary of the Senate of the State of Georgia, do hereby certify that the attached is a true and correct copy of Senate Resolution 310, as it was introduced and adopted by the Senate on February 8, 1978. Also attached is an excerpt from the Senate Journal of that date showing the vote on said resolution.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the Senate of the State of Georgia, this 22nd day of March, 1985.

APPENDIX D

/s/ Hamilton McWhorter, Jr.

SECRETARY OF THE SENATE OF THE

STATE OF GEORGIA

APPENDIX D

SENATE RESOLUTION 310

By: Senators Barnes of the 33rd, Banks of the 17th, Johnson of the 34th and others

ADOPTED

SENATE

A RESOLUTION

Condemning and urging the reprimand of Judge Anthony A. Alaimo; and for other purposes.

WHEREAS, Honorable Thomas F. Allgood, the distinguished Senator for the 22nd District, filed a timely motion for continuance of a criminal case in the United States District Court, Southern District of Georgia; and

WHEREAS, the continuance was based on the grounds that Senator Allgood, as attorney for the defendant, is under doctor's orders not to try any cases in the imme-

APPENDIX D

diate future as a result of a recent heart attack and on the grounds that the Senator would be in attendance at the regular session of the General Assembly of Georgia; and

WHEREAS, Senator Allgood was ordered to appear in court at 9:00 a.m. on Monday, February 6, 1978, for a hearing on the motion for continuance; and

WHEREAS, Senator Allgood's senior law partner appeared in his behalf to present the motion, but Judge Alaimo ordered Senator Allgood to appear in person at 8:30 a.m. Tuesday, February 7, 1978, to show why he was not present at the Monday hearing; and

WHEREAS, the General Assembly of Georgia was in regular session on Monday and Tuesday, February 6 and 7, 1978 and

WHEREAS, Senator Allgood gave the

APPENDIX D

reasons as stated above but was unjustly found in contempt of court by Judge Alaimo and fined $250.00; and

WHEREAS, Senator Allgood refused to pay the fine and was incarcerated until other attorneys filed an appeal in his behalf and paid his fine conditioned on such appeal; and

WHEREAS, it is inconceivable that a federal judge would not respect the deliberations of the General Assembly of Georgia; and

WHEREAS, if federal judges can prevent legislators from attending to their duties, the right of the states to govern themselves is in serious jeopardy; and

WHEREAS, the Senate commends Senator Allgood for placing the interest of his constituency and the Senate above his personal well-being.

APPENDIX D

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE that this Body does hereby condemn Judge Anthony A. Alaimo of the United States District Court, Southern District of Georgia, for his actions in finding Senator Thomas F. Allgood in contempt of court and does hereby urge his reprimand by the Judicial Conference of the United States.

BE IT FURTHER RESOLVED that the Secretary of the Senate is hereby authorized and directed to transmit appropriate copies of this Resolution to Honorable Jimmy Carter, President of the United States; Chief Judge John Brown, Chairman of the Executive Committee of the Judicial Conference of the United States; Attorney General Griffin Bell; Senator Herman E. Talmadge; Senator Sam Nunn; and Judge Anthony A. Alaimo.

APPENDIX D

The following resolution of the Senate was read and put upon its adoption:

SR 310. By Senators Barnes of the 33rd, Banks of the 17th, Johnson of the 34th and others:

A resolution condemning and urging the reprimand of Judge Anthony A. Alaimo for his actions in finding Senator Thomas F. Allgood in contempt of court.

On the adoption of the resolution, the President ordered a roll call, and the vote was as follows:

Those voting in the affirmative were Senators:

Ballard	Brantley
Banks	Broun of 46th
Barnes	Brown of 47th
Bell	Carter
Bond	Coverdell

APPENDIX D

Dean of 31st	Overby
Doss	Paulk
Eldridge	Pearce
English	Reynolds
Evans	Riley
Foster	Robinson
Gillis	Scott
Greene	Shapard
Holloway	Starr
Howard	Stephens
Johnson	Stumbaugh
Kennedy	Summers
Kidd	Sutton
Langford	Tate
Lester	Turner
McGill	Walker

Voting in the negative was Senator Hudson.

Those not voting were Senators:

Allgood	Barker

APPENDIX D

Dean of 6th	Thompson
Duncan	Timmons
Fincher	Traylor
Hill	Tysinger
Hudgins	Wessels
Russell	

On the adoption of the resolution, the yeas were 42, nays 1, and the resolution was adopted.

APPENDIX D

612 Cherry Street
Jesup, Georgia 31545

Honorable John Godbold, Chief Judge
11th Circuit Court of Appeals
50 Spring Street, S.W.
Atlanta, Georgia 30303-3147

My dear Judge Godbold:

My cases are now before the 11th Circuit Court of Appeals. I am acting as my own attorney although I am not an attorney per se. The numbers of my cases are 84-8386 and 84-8475 (85-8035). I wrote the entire court a letter dated April 15, 1985, in which one of the key issues, for the court to consider, is the failure of Judge Anthony Alaimo (Southern District of Georgia) to disqualify himself under 28 U.S.C. 455(a) in my reduction of

sentence motion and the consequences to my case and therefore my life and liberty! On pages 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 31, 32, 33, 34, 35, 36, 37, 38 and elsewhere in my April 15, 1985, letter to the court, I bring to its attention the unique and rare facts and circumstances, in my case, surrounding me and Judge Alaimo. (I had also previously written the court about the matter on March 1, 1985.)

On page thirteen of my April 15, 1985 letter, to the court, I point out that if there are any members of the court, who because of a possible very close personal relationship with Judge Alaimo, might have a problem with the statements, facts and record I present pertaining to him in my letter -- then I am sure that such members will do the right thing in deciding what to

APPENDIX D

do about disqualification in my case if such circumstances present any problems for them.

The enclosed newspaper article from the Florida Times Union, Saturday, April 20, 1985, page A-3, which circulates widely in our area of Georgia, quotes two members of the 11th Circuit Court of Appeals concerning their statements about Judge Alaimo. I assume the quotes and statements are essentially correct becuase they have been repeated elsewhere by the news media.

I do not know, for sure, at this point and time, if the reported statements, of the two appeal court judges, will be perceived by the "average man on the street" as ones which might cause him to harbor doubts about the judge's impartiality or

appearance of detached impartiality, (under 28 U.S.C. 455(a), if the two judges happen to consider my case, now before the court, which contains some delicate and sensitive issues pertaining to Judge Alaimo and myself. Every person has the right to freedom of speech and association under our Constitution. And certainly judges are called upon, many times, to attend and participate in such events as are detailed in the enclosed news article. The unfortunate thing about this specific situation is that --my case is now before the court and it contains as issue pertaining to Judge Alaimo and myself which is rather unique and rare -- and the "man on the street" knows

-Continued-

APPENDIX D

it and is aware also of the reported statements of the appeal judges, who may consider my case, with its unique circumstances -- and the "man on the street" also knows about the previous events pertaining to me and Judge Alaimo and still harbors doubt, about his impartiality and appearance of detached impartiality, when he (Judge Alaimo) denied my reduction of sentence motion -- and both Judge Alaimo and myself are widely known by the public ("man on the street") and live only fifty miles apart!

The reported tone of the statements of the appeal judges ... "my colleagues and I have praised him often in the law books" ... and ..."a man of absolute character and integrity" ... might be perceived by the "man on the street" as indications that such reflect a close personal relationship between the appeal judges and Judge

APPENDIX D

Alaimo. The idea being how would the appeal judges have such an in-depth knowledge of him (personal character, honesty, praiseworthiness) unless there was some close personal involvement on their part. In other words, the appeal judge's statements, as printed and read, do not reflect that such are strictly ones of a professional nature. For example, the statement: "my colleagues and I have praised him often in the law books". The quote did not say: my colleagues and I have praised his judicial decisions, or opinions in the law books -- It said we have praised him! This might denote a personal and not professional characteristic because of possible closeness to the individual. Additionally, the judge's statement: "A man of absolute character and integrity." The quote did not say: A judge of absolute character

APPENDIX D

and integrity -- it said a man! This might also denote a personal and not professional characteristic because of possible closeness to the individual. And, if such be possible, the "man on the street" might perceive that if such exists (close personal relationship) that they (appeal judges) might have a problem with impartiality or appearance of detached impartiality in deciding my case -- in which Judge Alaimo is an issue due to the unique and rare circumstances surrounding him and me! Additionally, the words ... "my colleagues" ... might also be perceived by the "man on the street" as indicating there are other members of the appeals court who might have a close personal relationship with Judge Alaimo which might cause them problems in my case. Even if the above statements, attributable

APPENDIX D

to the two appeal judges, were possibly quoted out of context or misquoted -- that is the quote and statement that the "man on the street" read and upon which he might very well base his perception of the matter! I bring these matters to your attention because of my respect for the court.

In light of the statements and facts in this letter, I am sure each judge of the Eleventh Circuit Court of Appeals will let their conscience be their guide concerning the issue of disqualification in my case. (28 U.S.C. 455 (a)). As you well know, today, perhaps more than ever, the federal judiciary is under heavy scrutiny concerning its conduct and appearance -- perhaps because more people are beginning to realize that the appointments are for life and that they (judiciary) police

APPENDIX D

themselves! I have great admiration and respect for the courts and our system of justice and fairness. It is because of this respect and admiration that I write this letter.

Faithfully,

/s/ Roscoe Dean, Jr.

Roscoe Dean, Jr.
612 Cherry Street
Jesup, Georgia 31545
912-427-2264

April 20, 1985

cc: U.S. Attorney, Savannah
Ms. Patty Stemler, U.S. Dept. of Justice
Judge Avant Edenfield
Clerk of the 11th Circuit Court of Appeals

APPENDIX D

THE FLORIDA TIMES-UNION/JACKSONVILLE JOURNAL

SATURDAY, APRIL 20, 1985

PAGE A-3

Courthouse renaming honors Judge Alaimo

By Gray Thomas

Staff writer

BRUNSWICK, Ga.-In a rare honor for a living man, the federal courtroom in Brunswick was dedicated yesterday in the name of U.S. District Judge Anthony A. Alaimo of Sea Island. He is the chief judge of the Southern District of Georgia.

"My colleagues and I have praised him often in the law books," said Judge Gerald B. Tjoflat of the 11th U.S. Circuit Court of Appeals. "[But] his reputation is nationwide."

Randall Jordan, past president of the Brunswick-Glynn County Bar Association, said the dedication would leave the court-

room "a place where mediocrity among judges and lawyers is not acceptable."

"Judge Alaimo has simply made us all better lawyers by the demands he puts on us in each case," said Brunswick attorney Wallace Harrell, who called Alaimo "the best trial lawyer in this part of the country" before he became a judge.

"His entire life has been one we wish we could all emulate," U.S. District Judge G. Avant Edenfield of Savannah said during the ceremony.

After reading a letter from Chrysler Corp. president Lee Iacocca praising Alaimo, U.S. District Judge Dudley Bowen of Augusta described Alaimo as "tough as woodpecker lips," with "an eye that could open an oyster at 60 paces," but also with "a heart of gold."

Judge James Hill of the 11th Circuit

APPENDIX D

said Alaimo is "a man of absolute character and integrity."

Alaimo, 65, was born in Sicily and emigrated to the U.S. with his parents when he was 2 years old.

A bomber pilot in World War II, Alaimo was shot down over the North Sea in 1943. He was the only survivor of the crash and was captured by the Germans. He helped plan an escape of Allied prisoners of war depicted in the movie The Great Escape. Alaimo did not flee in that escape, but he

(Picture Here)

Judge Anthony A. Alaimo
A man of "absolute integrity."

APPENDIX D

slipped away from a prison camp on his own and made his way to safety in Switzerland.

Alaimo began his law practice in 1948 in Atlanta. He moved to Brunswick in 1957, served four years as a Glynn County commissioner and was appointed to the bench by President Richard Nixon in 1971.

He became chief judge of the district in 1976 and has handled such complex cases as one in which he mandated reforms at Georgia State Prison near Reidsville.

His colleagues praised him yesterday for keeping the district's case backlog among the smallest in the nation.

"Never in my fondest dreams did I expect to hear the words I've heard this afternoon," Alaimo said. "I am simply filled with profound gratitude."

APPENDIX D

612 Cherry Street

Jesup, Georgia 31545

Honorable John Godbold, Chief Judge

11th Circuit Court of Appeals

50 Spring Street, S.W.

Atlanta, Georgia 30303-3147

My dear Judge Godbold:

I wrote you a letter on April 20, 1985, concerning a matter pertaining to my cases #84-8386 and 84-8475 (85-8035) now before the appeals court. As I stated before I am not an attorney per se but am acting as my own attorney in this matter.

The subject matter of my first letter to you (April 20, 1985) pertained to a news article attributing certain statements to two eleventh circuit appeal court judges concerning Judge Anthony Alaimo. As you know, Judge Alaimo's failure to disqualify himself in my reduction of sentence pro-

APPENDIX D

cess is an issue now before the 11th Circuit Court of Appeals. The following statements are an appendage to my first letter to you dated April 20, 1985.

Five or six of the judges now serving on the 11th Circuit Court of Appeals were appointed by former President Jimmy Carter. President Carter, while Governor of Georgia, was one of the main forces and was deeply involved in the day-to-day appointment process of Judge Alaimo's former law partner. The record shows that he "lashed" out at nearly anyone who opposed the appointment. Many people can attest to this fact. Mr. Carter and Judge Alaimo"s former law partner had a very, very, close personal relationship during his administration as Governor,President and even to this day! (As I have already informed you, and other members of the court, Judge Alaimo himself was also

strongly implicated in the Board of Regents matter.) I am not writing, however, to suggest that because five or six judges were appointed to the appeals court by President Carter that they should consider disqualifying themselves in my case. What I am writing to bring to your attention, however, is the following:

Judge P. Kravitch, appointed by President Carter, sat on the second panel in my case that rendered an adverse opinion, and by doing so, reversed an earlier and original panel decision in my case that was favorable to me! She, in fact, wrote the opinion of the second panel. It is standard precedent in the 5th and 11th circuits that one panel does not over-rule another panel's decision in a case -- but it did in mine! The point is that the above action might be perceived, by the "average man on

the street", under 28 U.S.C. 455(a), as one that might cause him to harbor doubts about the specific judge's impartiality or appearance of detached impartiality. He might wonder if the judge had a close personal relationship with Governor-President Carter prior to her appointment to the bench. Additionally, he might wonder if the judge had a close personal relationship with Judge Alaimo or his former law partner before her appointment. He might also wonder if this caused the judge any problems in my case. (The above is not to suggest that everyone appointed by President Carter might have doubts raised against them. In this specific instance Judge Kravitch wrote the opinion, of a second panel, which overruled the original panel's decision in my cases. Precedent of the 5th and 11th circuits, as stated before, is that one panel

does not over-rule another panel's decision in a case.)

The enclosed Exhibit F Appendage, to my April 15, 1985 letter and exhibits to the court, sheds additional light on why I am now bringing this matter to your attention. See the appendage exhibit which contains the news article excerpts about Judge Alaimo's former law partner; Governor Carter's statement after the Senate rejected the appointment; also letter-excerpts from my speech concerning the governor which were broadcast all over the state and printed in many of the state's newspapers plus the entire speech being broadcast over the Brunswick radio station. It should be pointed out again that Governor Carter was very strongly involved in the day-to-day nomination process of Judge Alaimo's former law partner to the Board of Regents. It

APPENDIX D

should be pointed out again that Governor Carter had a very, very close personal relationship during his administration as Governor, President, and even to this day with the former law partner of Judge Alaimo, who was rejected as a nominee to the Board of Regents.

The Board of Regents nomination process of Judge Alaimo's former law partner was therefore no ordinary controversy. It went so far that the state legislative representative from Brunswick-Glynn County, Rep. Billy Rogers, switched political parties in order to run against me for senator in the Democratic Primary. There were very, very strong implications that he was backed by Governor Carter. I exposed this matter and defeatd him badly! Other senators, like Sen. Ed Zipperer of Savannah, Georgia, Chairman of the University Committee, which

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withheld endorsement of Judge Alaimo's former law partner, also received opposition in his bid for re-election. There were also implications that the opposition was backed by Governor Carter. It appears there were also other senators who recieved the same treatment. Be that as it may -- my only purpose in writing this second letter is to bring these facts and circumstances to your attention -- so that my rights as a defendant can be protected -- insofar as fairness, impartiality, appearance of detached impartiality and justice are concerned -- in my case. After all, my life and liberty are at stake! As stated before, I have great respect and admiration for the courts!

Faithfully,

/s/ Roscoe Dean, Jr.

Roscoe Dean, Jr.

APPENDIX D

612 Cherry Street

Jesup, Georgia 31545

912-427-2264

April 25, 1985

cc: Clerk, U.S. 11th Circuit

All Judges of 11th Circuit

U.S. Attorney, Savannah

Ms. Patty Stembler, U.S. Dept. of Justice

Judge Avant Edenfield

APPENDIX D

Mr. Spencer Mercer, Clerk
11th Circuit Court of Appeals
50 Spring Street, S.W.
Atlanta, Georgia 30303-3147

My dear Mr. Mercer:

Enclosed are two different items that are to be docketed in my cases #84-8386 and 84-8475 (85-8035) immediately. Item one is a second letter to Chief Judge Godbold. The second letter is an appendage to the letter I wrote him on April 20, 1985. Please docket this letter and see that all seventeen judges receive a copy of it. Enclosed is the original letter to Judge Godbold. Please see that he receives it. Thank you.

APPENDIX D

The second item to be docketed in my cases and sent to all seventeen judges is an Appendage to Exhibit F which is an exhibit in my April 15, 1985, letter and exhibits, to all seventeen judges of the court.

It was humanly impossible for me to find and assemble all of this material when I wrote my April 15, 1985, letter to the court. I not only lacked time but also financial resources and I was acting as my own attorney although I am not an attorney per se. All I am trying to do is to get the facts to the court since my life and liberty are at stake. Additionally, I am working under medical difficulties and my case is very unique in some aspects. Be that as it may, the appendages are not enclosed for the court's consideration.

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It should also be pointed out that the date of March 1974 on the Exhibit Sheet in my April 15, 1985, letter to the court, under Exhibit F, should be struck and the date of January 1974 should be inserted in its place.

Thank you for your consideration.

Faithfully,

/s/ Roscoe Dean Jr.

Roscoe Dean
612 Cherry Street
Jesup, Georgia 31545
912-427-2264

APPENDIX D

April 25, 1985

cc: All Judges of 11th Circuit
U. S. Attorney, Savannah
Ms. Patty Stembler, U. S. Department of Justice
Judge Avant Edenfield
11th Circuit Court of Appeals Clerk

Correction: The word **not** should be struck on line nineteen on page 95A.

The Bishop appointment has been controversial, and a cause of concern to the people, because even though Mr. Bishop might be entirely innocent of any intent of conflict of interest, his mere presence on the Board of Regents, while serving as a member of the State Democratic Executive Committee, County Attorney and City Legal Representative, is not in the best interests of the people because it could bring about a conflict of interest.

And finally, we come to several other matters that also cast doubt on the suitability of the Governor's appointment to the Board of Regents.

First, is it proper or ethical for a Federal Judge to call members of the Senate to "politic" and secure the appointment of a particular man to the Board of Regents? What if the senator is also a lawyer and has

APPENDIX D

to practice law before the same judge? Would justice be served in such a situation, if the Senator did not vote the way the judge demanded? Is it highly unethical and improper, as well as a form of "pressure" for such action on the part of a judge? Is this in the people's best interests? A number of my constituents have asked this question.

Is it proper and ethical for a board member of the Department of Offender Rehabilitation to contact Senators to "politic" to secure the appointment of a man to the Board of Regents, especially if the board member's trip to Atlanta is paid for by expense money from the taxpayers to attend a board meeting? Isn't this a waste of taxpayer's money? Is it a form of "pressure" if such a Senator is contacted about his vote on Senate confirmation of an

appointee, and such Senator had to go later before the Offender Rehabititation Board, and had not voted in the way demanded by the Board Member"

(Page 17 is an excerpt from a speech I delivered at the State Capitol and which was broadcast over radio station WGIG in Brunswick, Georgia at 5:30 p.m. on Tuesday, January 29, 1974. Brunswick is the location of federal Judge Alaimo's chambers and he was and is the only federal judge in Brunswick-Glynn County.)

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The Brunswick News

January 28, 1974

Page 18

Dean to Explain

His Opposition

To Carter Action

State Sen. Roscoe E. Dean of Jesup will address the people of his Sixth Senatorial District by radio at 5:30 p.m. Tuesday, the 30-minute talk to be carried over station WGIG in Brunswick and WLOP in Jesup.

The senator said today his broadcast will be a "discussion about the governor's appointments to the Board of Regents, the Board of Medical Examiners and the Funeral Services Board."

Dean told The News he will reveal his reason for opposing Gov. Jimmy Carter's appointment of Brunswick attorney James A.

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Bishop to the Board of Regents. . . . .

(News excerpt from Brunswick News that verifies my intent to broadcast a speech over a Brunswick radio station concerning Board of Regents appointment of Judge Alaimo's former law partner. Page 17 on the preceding 3 pages is an excerpt from the speech that I delivered over the radio station.)

The Brunswick News

January 30, 1974

Page 20-A

Bishop Will Try to Resolve

Conflicts Over Appointment

Brunswick attorney James A. Bishop said today he "hopefully can resolve" questions raised by state Sen. Roscoe Dean over Bishop's appointment to the state Board of

APPENDIX D

Regents.

Bishop was appointed to the board by Gov. Jimmy Carter, but the Sixth District Senator from Jesup had pledged to block the appointment along with two other Carter appointments in the same district.

In a one-hour radio broadcast here last night Dean offered. . . . .

(News excerpt that verifies that I actually delivered the speech over the radio station on January 29, 1974.)

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The Brunswick News

January 14, 1974

Page 18

Rogers Chastizes Dean

For Regent Opposition

State Sen. Roscoe Dean's announced plan to invoke senatorial courtesy to block confirmation of James A. Bishop as a member of the state Board of Regents has drawn sharp criticism from Glynn Couunty Rep. Charles W. Rogers.

The Brunswick News

Friday, January 25, 1974

Page 18

Regent Dispute Brings

Opposition to Zipperer

A young Pembroke businessman, testing political waters in Glynn County for a race against Sen. Ed Zipperer of Savannah, has

criticized the incumbent Zipperer for not taking issue with Sen. Roscoe Dean over the latter's stand against confirmation of James A. Bishop to the Board of Regents.

Mell R. Traylor, 25 a former . . . . . .

The Brunswick News

Monday, February 11, 1974

Page 20

Dean Promises 'Startling' Development In His Opposition to Bishop Appointment

State Sen. Roscoe Dean of Jesup today promised "rather startling new developments" when he goes before the Senate Education Systems Committee Tuesday to oppose confirmation of Brunswick attorney James A. Bishop as a member of the Board of Regents.

The Brunswick News

Wednesday, February 13, 1974

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Page 20-A

Dean Apparently Wins

Bout on Regents Post

When a Senate Education Systems Committee voted 9-2 Tuesday to withhold endorsement of James A. Bishop's appointment to the Board of Regents, it all but completed Sen. Roscoe Dean's threat to block confirmation of the Brunswick attorney.

The appointment presumably will still go to the Senate floor for a vote, but capitol observers say there is no chance for confirmation after the committee action, and with Dean invoking "senatorial courtesy."

The Brunswick News

Friday, February 15, 1974

Page 20

In Bishop Appointment

Governor Says Dean's Charge

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Of Political Payoff is Untrue

Gov. Jimmy Carter Thursday clarified statements and charges that have been made regarding his unsuccessful attempt to place Brunswick attorney James A. Bishop on the State Board of Regents.

The governor's statements, aired this morning over local radio stations, were mainly in response to charges made by Sixth District Sen. Roscoe Dean who opposed Bishop's appointment.

(Local news excerpts which outline part of controversy surrounding Judge Alaimo's former law partner's appointment to Board of Regents.)

APPENDIX D

Brunswick, Ga.

Jekyll Island

St. Simons Island

Telephone Directory

Including Sea Island

Southern Bell

Area Code 912 May 1970

(Picture Here)

(Brunswick telephone directories for 1970 and 1971 verifies that Mr. Bishop, the nominee to the Board of Regents, was a law partner of Judge Alaimo before he was appointed federal judge in 1971.)

APPENDIX D

Brunswick -

Jekyll Island -

St. Simons Island

Including Sea Island

Area Code 912

Telephone Directory

Southern Bell

May 1971

(Picture Here)

APPENDIX D

BRUNSWICK, GA.

Southern Bell

ALPHABETICAL TELEPHONE DIRECTORY

(Seventy-Fourth line of left-hand column is listed as follows in the Brunswick telephone directory:)

Alaimo Taylor & Bishop attys

1803Norwich --- 264-2390

APPENDIX D

ROSCOE E. DEAN, JR.

District Six

612 Cherry Street

Jesup, Georgia 31545

Atlanta Phone (404) 656-5070

JESUP

Office (912) 427-4419

Home (912) 427-2264

COMMITTEES:

Chairman

NATURAL RESOURCES AND
ENVIRONMENTAL QUALITY

Vice-Chairman

AGRICULTURE

APPROPRIATION

ECONOMY, REORGANIZATION AND
EFFICIENCY IN GOVERNMENT

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(SEAL)

(STATE OF GEORGIA)

The State Senate

Atlanta, Georgia

January 21, 1974

Governor Jimmy Carter
State Capitol
Atlanta, Georgia

My dear Governor Carter:

A growing number of people in our Senatorial District are raising questions about the propriety and legality of three appointments from our Senatorial District, which you have nominated to serve on State Boards.

APPENDIX D

Many citizens in our Senatorial District respectfully request and urge you to immediately consider making three new appointments from our Senatorial District, to take the place of the three present ones, since grave and serious questions are being raised by the people concerning their confirmation and approval by the Senate. If you honor the request to appoint three new appointments from our Senatorial District, then your action could very well insure proper and legal appointments in our Senatorial District.

The three appointments you have nominated from our Senatorial District under question by the people are:

A. Board of Regents

B. Board of Medical Examiners

C. Funeral Service Board

APPENDIX D

Your proper and legal nomination of three new appointments from our Senatorial District, for the above three boards, would be deeply appreciated by the people of our Senatorial District.

Your action would also help correct untrue statements, hints, and attitudes reportedly made by you or the Governor's Office to the news media. One such reported untrue statement and attitude by you is that I, as State Senator, am preventing my own District people from having long-awaited representation on State Boards. This is not true because the 1974 official records show I am for proper and legal appointments to my Senatorial District and have worked hard to get them. For example, six people have been appointed to State Boards,

APPENDIX D

Commissions and Councils from Glynn County, whose appointments, I, in many cases, personally recommended and successfully worked for. Three people from Glynn County have been properly and legally appointed to the State Coastal Fisheries Advisory Commission. Three other persons from Glynn County have been properly and legally appointed to the State-wide Vital Areas Council. Three people from Camden County, which I represent, have been properly and legally appointed to State Commission and Boards; one to the State-wide Herty Foundation Board of Trustees and two to the State Coastal Fisheries Advisory Commission. One person from Wayne County, which I represent, has been properly and legally appointed to the State-wide Pharmacy

APPENDIX D

Board. These appointments alone show my good faith and sincere effort in the year 1974 in the matter of working for proper and legal representation on State Boards, Commission and Councils for my Senatorial District.

Another unfortunate statement and attitude reportedly made by you as Governor, or the Goverrnor's Office, to the news media is that I, as State Senator, would have opposition and a candidate running against me in the next election, if I did not "go along" with you, The Governor, on your appointments.

First of all, it is highly unfortunate that the Governor, or the Governor's Office, would "stoop" so low as to get up a candidate to run against me, or any other State Senator, merely because I did

APPENDIX D

my duty in representing the people's feelings and views to you. Such action indicates that the Governor's Office will try to defeat and destroy any person who stands for the people and represents their best interests, with which you may not agree.

Once a President of the United States came to Georgia and stated he wanted the late beloved U.S. Senator Walter F. George defeated. Senator George responded to the threat by saying, "Mr. President, I accept your challenge." Senator George was re-elected overwhelmingly by the people.

In the same vein as Senator George, I say to you, sir, "Governor, I accept your challenge!" Such an attitude on the part of the Governor's Office is indicative of a dictatorial type of "power-

grab" which says that the Governor cannot be wrong, legally or otherwise. Therefore, it is not a question of me "going along" with you, as Governor, on your appointments. (The official record outlined above proves I have and am working for the proper and legal appointments in my Senatorial District.)

The question is: Will you "go along" with the peoples' request to make three new appointments, from our Senatorial District, of which no question can be raised concerning propriety or legality? If you fail to do so, then your actions, in the eyes of many, will show that you are responsible for preventing our Senatorial District from receiving proper and legal appointments.

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Further, the actions and attitudes reflected by your office, appear to intimidate every member of the Senate not to vote their convictions, when you insist on having them "rubber stamp" your recommendations. I am not the first, nor will I be the last Senator to dissent with a Governor or the Governor's Office.

Another statement and attitude reportedly made by you or the Governor's Office to the news media is that if the State-at-Large Board of Regents appointment is not confirmed by the Senate, then such an appointment will not go to any Senatorial District or Senator who votes against confirmation, regardless of the facts or reason.

Such a statement or attitude is an out-and-out threat. It also indicates

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a contempt for representative government and democratic institutions. It indicates that you or the Governor's Office do not believe or support the "Advice and Consent" section of the Georgia Constitution on Executive Appointments. It indicates that you, or the Governor's Office, do not believe or support the "Separation of powers" and "checks and balances" system guaranteed to the people by the Georgia Constitution. Such an attitude further indicates you, or the Governor's Office, have violated the "separation of powers" doctrine of the Georgia Constitution. The Georgia Constitution specifically states there will be three separate branches of government -- the Executive, the Legislative and the Judicial. When one branch of government tries to dictate

APPENDIX D

to the other branch of government, then this violates the "separation of powers" guaranteed to the people in the Constitution and leads to the destruction of the "checks and balances" system of government.

You, as Governor, are a part of the Executive branch of Government. When you or the Governor's Office stated that the appointment to the Board of Regents, would not go to a Senatorial District whose Senator voted for Senatorial Courtesy, you, or the Governor's Office, then were well on your way to dictating, threatening and taking over the functions of the Legislative branch of Government. Such action violates the "separation of powers" guaranteed in the Constitution.

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Most respectfully,

—

/s/ Roscoe Emory Dean, Jr.

Roscoe Emory Dean, Jr.
State Senator
Sixth Georgia District

REDjr./dh

APPENDIX D

ROSCOE E. DEAN, JR.

District Six

612 Cherry Street

Jesup, Georgia 31545

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EFFICIENCY IN GOVERNMENT

APPENDIX D

(SEAL)

(STATE OF GEORGIA)

The State Senate

Atlanta, Georgia

November 19, 1973

Lt. Gov. Lester Maddox
State Capitol
Atlanta, Georgia

My dear Lt. Gov. Maddox:

Many people have recommended to me that all appointees to boards and agencies of state government that are made by the Executive Branch of government and approved by the Legislative Branch of government be required to come before a Senate Committee before confirmation.

APPENDIX D

It has been said that sometimes in the past, members of boards and agencies have been appointed by the Governor and received rubber stamp approval by the Senate. Sometimes senators have never had the opportunity to meet or know an appointee before he is approved by the Senate. Rubber stamp approval not only hurts the democratic process, but it also weakens the foundations of governmental institutions and is a great disservice to the people. Such action erodes the people's confidence in representative government.

The State Constitution of Georgia provides that appointments by the Executive be done with the "advice and consent" of the Senate. This safeguard is also in the U.S. Constitution. This guarantees the check-and-balance system of our government.

Many people have stated that members

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appointed to state government boards and agencies form a part of an invisible government. They make policy and regulations that many times has the effect of law but yet they are not elected by the people.

Also some appointees have been led to believe that an appointment by the Governor is all there is to the process and that is is final. They have never been informed that they have merely been nominated and sworn subject to approval or disapproval by the Senate.

In our National Congress all appointees by the President are called before a Senate Committee and thoroughly investigated before a decision is made about confirmation. At the people's request I strongly urge that a Senate Committee designated by you, personally question each appointee during the two week recess period of the legislature this

year. In fact, if you concur, I will draft legislation requiring all appointees to appear before a senate committee and give the committee subpoena power. Some have suggested such a committee might ask the assistance of the Legislative Counsel office, the Georgia Attorney General's Office, the Georgia Department of Investigation; the Federal Bureau of Investigation; the State Revenue Department, the Federal Internal Revenue Service and other appropriate departments and officials for aid in their scrutiny and investigation of each appointment.

It has been suggested that the committee might also wish to use some guidelines such as the following in considering each appointment: (1) the appointee's philosophy and beliefs about government; (2) background, qualifications, and abilities; (3)

APPENDIX D

court record, if any; (4) adequate time to serve; (5) status of health; (6) morals and ethics; (7) ability to work with others and general attitude and personality; and (8) (a) ascertain whether the appointment was made on the basis of merit or as a result of political pressure or influence or as a political pay-off; (b) for example, did the appointee contribute strongly from a financial standpoint or engage in heavy political activity for the Governor or anyone who might have influenced the person's appointment?; (c) did the appointee promise anyone financial or other support in future races in return for the appointment?; and so on.

Many Georgians feel it is far better to lose an appointment in a senatorial district than to confirm someone who would not serve the people's best interests. In

other words they believe the senate should not approve appointments merely to keep an appointment for a certain senatorial district if the appointee fails to meet the criteria and standards the people of Georgia are entitled to.

For example, it has been reported that one appointee has made the statement that legislators elected by the people should not appear before any state agency, especially if such member of the agency was confirmed by senators in the senate. Such a philosophy of government expressed by an appointee indicates an indirect attempt to take away representative government from the people. It advocates taking away the right of a legislator to represent his constituents and do his duty and job. If one of my hometown people has a problem before the Pharmacy Board, due to a mix-up in the

issuance of a license; or a real estate firm in my hometown is trying to get a young man certified and seeks my assistance in securing the necessary information for doing so, . . . am I to be completely blocked off from my contact with the government which I represent, in trying to represent my district? If so, my district does not need me or any legislator in Atlanta, as our usefulness would be so diluted and it would be of little, if any help in any situation. The people and representative government would be the losers.

It has also been reported that another appointee has been secretly sneaking behind the backs of legislators and trying to undermine and discredit them personally and their efforts to get the facts and truth about alleged irregularities in state government. It is getting to the point where

many legislative committees cannot adequately function in making official inquiries leas[t] their individual members be subjected to a barrage of adverse publicity and smoke-screen charges from an appointee. Such tactics by an appointee, who is not elected, is a slap-in-the-face at the people of Georgia who elect dedicated public servants to represent them.

Many people feel we do not need appointed board members to act as a rubber stamp for the Executive Branch of government, but we need a system of checks and balances, wherein a matter can be dealth with not only by some of the Governor's appointees who may represent one school of thought, but also by the Legislative Branch, with the privilege of looking into any matter to the satisfaction of all concerned. Ony in this way can the people of Georgia be fully represented

APPENDIX D

by the public servants who are duly elected to represent them.

In my opinion there have been some fine and qualified people who have been recently nominated to serve on various boards and agencies in government by the Governor. It is our duty to insure that these outstanding people are not discredited by other appointees of the Governor who may not be qualified and who may not be a credit to the people who pay the bill --- the taxpayers of Georgia.

Faithfully,

/s/ Roscoe Dean, Jr.

Roscoe Dean, Jr.

State Senator

6th Georgia District

APPENDIX D

JOURNAL

OF THE

SENATE

OF THE

STATE OF GEORGIA

AT

THE REGULAR SESSION

Commenced at Atlanta, Monday,
January 14, 1974 and adjourned
Tuesday, February 26, 1974

(SEAL)

(STATE OF GEORGIA)

1974

Atlanta, Georgia

APPENDIX D

Mrs. Barbara Blum of Fulton County as a member of the Vital Areas Council for the term of office beginning June 21, 1973, and ending as provided by law.

Honorable James T. McIntyre, Jr., of Fulton County as a member of the Vital Areas Council for the term of office beginning June 21, 1973, and ending as provided by law.

Honorable Henry E. Williams of Camden County as a member of the State Forestry Commission for a term beginning January 24, 1974, and ending January 1, 1981.

Honorable James C. Durden of Glynn County as a member of the Georgia State Board of Funeral Service for a term beginning May 11, 1973, and ending February 13, 1976.

Honorable Henry E. Williams of Camden

APPENDIX D

County as a member of the Charles H. Herty Foundation for a term beginning October 31, 1973, and ending February 19, 1978.

Dr. Robert A. Pumpelly of Wayne County as a member of the Composite State Board of Medical Examiners for a term beginning October 23, 1973, and ending September 1, 1977.

Honorable Carey E. Jones of Wayne County as a member of the Georgia State Board of Pharmacy for a term beginning October 4, 1973, and ending November 1, 1974.

Honorable James A. Bishop of Glynn County as a memberr of the Board of Regents of the University System of Georgia for a term beginning January 4, 1974, and ending January 1, 1981.

Mrs. Drucilla A. Crawford of Muscogee County as a member of the Georgia State Board of Cosmetology for a term beginning January 31, 1974, and ending May 1, 1976.

APPENDIX D

Sincerely,

/s/ Jimmy Carter

JC:whc

The President resumed the Chair.

The following general bill of the Senate, favorably reported by the committee, was read the third time and put upon its passage:

SB 516. By Senator Coggin of the 35th:

A bill to amend an Act comprehensively and exhaustively revising,

APPENDIX D

on Thursday, February 7, and voted unanimously DO CONFIRM on the following appointments to the State Board of Education:

Honorable Roy A. Hendricks of Candler County

Honorable W. Asbury Stembridge of Bibb County.

Respectfully submitted,

/s/ Terrell Starr

Terrell A. Starr, Chairman

Senator Dean of the 6th requested that the confirmation of Mr. James A. Bishop to the Board of Regents of the University System be deleted from the roll call of all appointments.

Senator Dean of the 6th requested that the confirmation of Dr. R. A. Pumpelly to the State Board of Medical Examiners be

deleted from the roll call of all appointments.

Senator Dean of the 6th requested that the confirmation of Mr. James C. Durden to the State Board of Funeral Service be deleted from the roll call of all appointments.

The President stated that one roll call would be taken on all appointments listed in the hereinabove mentioned communication from His Excellency, Governor Jimmy Carter, except the three deletions above.

The President ordered a roll call on all appointments not objected to, and the vote was as follows:

Those voting in the affirmative were Senators:

Ballard	Broun of 46th
Barker	Brown of 47th
Bell	Carter

APPENDIX F

Cleland
Coverdell
Cox
Dean
Doss
Duncan
Eldridge
Fincher
Garrard
Gillis
Hamilton
Henderson
Herndon
Hill
Holley
Holloway
Howard
Hudgins
Jackson
Johnson
Kennedy
Kidd
Langford
Lester
London
McDuffie
McGill
Moore
Parker
Reynolds
Riley
Salter
Skene
Smalley
Starr
Stephens
Thompson
Tysinger
Ward
Warren

APPENDIX D

Wasden	Zipperer

Those not voting were Senators:

Coggin	Summers
Overby	Sutton
Rowan	Webb
Smith	Young

On the confirmation of the appointees, the ayes were 48, nays 0, and all of the appointments were confirmed.

Senator Smith of the 34th filed the following statement with the Secretary:

"I supported all appointments of the Governor not objected to by a Senator. When the vote was taken on the governor's appointments, I was unaware that a vote had been called for until it appeared on the board.

There was so much noise and

confusion I did not hear the call for a vote until it was over.

Therefore, I ask that the Journal show that I intended to vote "Yes" on all appointments not objected to."

Senator Sutton of the 9th filed the following statement with the Secretary:

"I supported the Holloway amendment to HB 1376 and planned to vote "aye" on all of the appointments of the Governor not objected to by a Senator; however I was ill and away from the Senate at the office of a doctor at the time of these votes."

The Committee on the University System submitted the following report:

THE STATE SENATE

Atlanta, Georgia

1088 APPENDIX D

February 13, 1974

Honorable Hamilton McWhorter, Jr.
Secretary of Senate
State Capitol
Atlanta, Georgia 30334

Dear Mr. McWhorter:

The University System of Georgia Committee met on February 12, 1974, to consider the Governor's appointees to the Board of Regents. The Senate University System Committee voted eight to two to uphold Senatorial Courtesy not to endorse candidate, Mr. James A. Bishop, to the Board of Regents.

Sincerely yours,

/s/ Edward H. Zipperer
Chairman
University System of Georgia

On the confirmation of James A. Bishop to the Board of Regents of the University System, the President ordered a roll call,

APPENDIX D

and the vote was as follows:

Those voting in the affirmative were Senators:

Broun of 46th	Howard
Carter	Langford
Cleland	Rowan
Eldridge	Smalley
Garrard	Sutton
Henderson	Ward
Herndon	Zipperer
Holloway	

Those voting in the negative were Senators:

Bell	Duncan
Brown of 47th	Fincher
Coggin	Gillis
Coverdell	Hamilton
Cox	Hill
Dean	Holley
Doss	Hudgins

APPENDIX D

Jackson	Riley
Johnson	Salter
Kennedy	Skene
Kidd	Smith
Lester	Starr
London	Stephens
McDuffie	Thompson
McGill	Tysinger
Moore	Warren
Overby	Wasden
Parker	Young
Reynolds	

Those not voting were Senators:

Ballard	Summers
Barker	Webb

On the confirmation of James A. Bishop, the ayes were 15, nays 37, and the confirmation of James A. Bishop to the Board of Regents of the University System was rejected.

APPENDIX E

FILED
U.S. DIST. COURT
SAVANNAH DIV.
Nov 19 8 32 AM'82
CLERK, /s/ G. Hendrix
SO. DIST. OF GA.

U.S. Clerk of Court (Attn: Ms. Hendrix)
Federal Courthouse
Savannah, Georgia

My Dear Sir:

Enclosed is an amendment to my motion for reconsideration for reduction of sentence. My docket number is 480-13. Please file this amendment to my motion and attachments and enter it upon the official court records. Thank you for your consideration.

Faithfully,

/s/ Roscoe E. Dean, Jr.

Roscoe E. Dean, Jr.

APPENDIX E

P.O. Box 2000

Lexington, KY. 40511

Date: Nov. 17, 1982

APPENDIX E

STATE OF KENTUCKY

COUNTY OF FAYETTE

I, Roscoe E. Dean, Jr., hereby swear and affirm that the following attached amendment and exhibits to my motion for reconsideration were prepared and signed by me this 16 day of November 1982.

/s/ Roscoe E. Dean, Jr.

Roscoe E. Dean, Jr.

Sworn to and subscribed
before me this 16th
da of November
1982

/s/ Betty J. Tuttle

Notary Public
Fayette County
STATE OF KENTUCKY
My Commission Expires:
7-2-85

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

United States	)	
	)	
vs	)	
	)	Docket 480-13
Roscoe Emory Dean, Jr.	)	
	)	
Defendant	)	

U.S. DISTRICT COURT

Southern District of GA

Filed in office

8:32 M.

11-19 1982

/s/ G. Hendrix

Deputy Clerk

MOTION FOR RECONSIDERATION AMENDMENT

Now comes Roscoe E. Dean, Jr. and moves the court to reconsider his motion for reduction of sentence pursuant to Rule 35. and states the following:

APPENDIX E

1.

The Government in its response dated September 24, 1982, in Point One refers the court to the Appeal's Court opinion, Head-note Four, in an effort to link defendant and alleged co-defendant to the existance of a conspiracy.

Attached as a reply to the Government is a part of Section II of the alleged co-defendant's en banc brief which was filed but not considered by the Appeal Court. It is marked as Exhibit A. It is presented as a possible aid to the court in its deliberations on the reconsideration motion of the defendant. The reason is because the Government, in effect, is attempting to re-argue the case in its reply, by citing the Appeal's Court opinion. Furthermore, since the trial judge of defendant's case is not considering the reduction of his sentence

motion, such an exhibit may be of some benefit to the court in ascertaining all the facts and documents that are a part of the case. The subject of inculpatory and exculpatory evidence as it pertains to the case is discussed in Exhibit A. This is a reply to the Government's reference to Headnote Four of the Appeal Court opinion.

Additionally, the Government in its reply, In Point One, completely ignores the results of a certified polygraph examination taken by defendant. This is significant in light of the fact that defendant, by scientific instrument, verifies that there was no linkage between himself and alleged co-defendant as to a conspiracy. This is important because the polygraph examination results are a kind of direct testimony subjected to scientific examination. Defendant submitted to an examination because of a

mis-carriage of justice in his case. Defendant contends there is no time limit on truth. Polygraph examination to defendant was administered by an experienced national expert of high integrity from Savannah, Ga. Said polygraph examiner has conducted tests for both Government and defendants over the years. He is highly respected by both. Polygraph results are accepted into evidence in many courts and states. Defendant is not being critical of decision of jury because of results of polygraph test. Defendant is merely pointing out to court that jury did not have benefit of said test during its deliberations. Also, jury did not have the benefit of the State Attorney General's statements made after the trial. Exhibit D.

2.

The Government in its response, in

APPENDIX E

Point Two, refers the Court to the Appeals Court opinion, Headnote Nine, in an effort to justify that Defendant was not entrapped.

Attached as a reply to the Government is Defendant's en banc brief which was filed but not considered by the Appeals Court. It is marked as Exhibit B. Attached also as a reply is a memo from the Dean Emeritus of Emory Law School The memo is marked as Exhibit C. The law dean memo is already a part of court records but was never permitted to be presented to the jury in the form of testimony. Both of the attachments are a reply to the Government's reference to Headnote Nine of the Appeals Court opinion. Furthermore these attachments may be of some benefit to the court in ascertaining all the facts and documents that are part of the case as it considers the motion for reconsideration. This is

especially true since the Government is citing the Appeals Court opinion in its reply.

Additionally, the Defendant calls the Court's attention to U.S. vs Cong. Kelley, District of Columbia, 1982. Defendant points out that this decision had not been rendered when the Appeals Court issued an opinion in Defendant's case. The Kelley decision and rationale in many, not all, intricate points, parallels Defendant's case. The parallel can be drawn from Defendant's own trial transcript where he, in effect, on two or more occasions, tells Government Agent Friedman "No" he will not go along in a drug conspiracy. The Kelley decision is being appealed but it is a valid opinion at this point and time. Therefore for argument sake only, even if a defendant is originally pre-disposed, saying no to a

Government agent should end the matter.

Furthermore, recent events indicate that Government Agent Friedman attempted to "use" and manipulate Defendant's case and the judicial process for political purposes. He was defeated badly for State Solicitor in Fulton County. Exhibit E.

3.

The Government in its reply, in Point Three, maintains that Defendant is a threat to the community.

As a reply Defendant calls Court's attention to Defendant's sworn-to and notarized affidavit answering the unproven allegation about an alleged political assassination. The affidavit from Defendant is on file with the Court. Furthermore, Defendant calls the Court's attention to the evaluation and testing of Defendant by a prominent Georgia psychologist in which he

concludes that Defendant is not a threat to himself or the community. Such evaluation is already on file with the Court and the alleged allegation about a political assassination was presented to the psychologist at the time of his evaluation of Defendant. Additionally, representative people from Defendant's hometown testified (some proffered) at his re-sentence hearing and bond hearing that he was not a threat to his community or society. Furthermore, Government did not oppose Defendant's bond on grounds of him being a threat, before or after his conviction in 1980, although Court records verify they had knowledge of so-called information about an alleged political assassination, at that time. Defendant, in fact, lived in his community for over two years while on appeal.

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The Government in its reply, Point Four, calls attention to an Exhibit C from a U.S. Probation Officer about Defendant.

As A reply Defendant calls Court's attention to several matters:

A. The U.S. Probation Officer attempts to interpret the psychologist's evaluation and testing of Defendant - yet Probation Officer offers no credentials that he is a trained or licensed psychologist. Furthermore, U.S. Probation Officer conducted no psychological testing of Defendant in his evaluation as contained in Government's pre-sentence investigative report.

B. U.S. Probation Officer attacks Defendant's military record. Defendant has recently replied to the unproven allegations by filing with Court a sworn-to and notarized affidavit about his military record.

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C. U.S. Probation Officer, in effect, challenges his own statistics about length of sentence and also states that Court should consider the position the Defendant held in the community.

In reply, the Defendant held no position, appointed or elected, in the community at the time of investigation, indictment, trial or thereafter.

Secondly, the U.S. Probation Officer did not show that the majority of Defendants who received split sentences or probation had a severity rating lower than Defendant in this case. By the law of averages, therefore, it is reasonable to conclude that a substantial number of the above cases (from his statistics) that received split sentences or probation, did indeed have a more severe or a similar rating as Defendant in this case.

APPENDIX E

Furthermore, the record indicates that a former Georgia State Senator's ten year federal sentence was modified, in effect, to approximately sixteen months of incarceration and the rest to be served on parole. The modification was recommended by the Federal Judge to the Parole Board. The alleged nature of the crime may have been different from Defendant's case, but the alleged severity was very similar.

5.

The Government in its response, in Point Five, maintains that Defendant has stated no mitigating circumstances to warrant Court to reduce Defendant's sentence. The Government maintains that Defendant's true intents were clearly demonstrated at trial through taped conversations.

Attached as a reply to the Government is Defendant's en banc brief, marked as

APPENDIX E

Exhibit B, which on pages ten - fifteen, clearly answers and addresses the taped converation matter. Furthermore, the Government reply raises two questions:

A. How can true intent be finally established until all the tapes have been completely and thoroughly examined and it established that they are true, correct and accurate? Defendant was denied adequate time, after receiving the tapes from the Government, to have all of them thoroughly examined by a national expert. The national expert's testimony about this is covered in Defendant's en banc brief attached.

B. Results of the polygraph examination verified that there was no linkage between Defendant and co-

defendant as to a conspiracy. If there was no linkage, how can intent be an issue?

6.

The Government in its response, in Point Six, maintains Defendant received a moderate sentence and does not merit a reduction in sentence.

In reply, Defendant calls to Court's attention the following:

A. Trial judge, at original sentencing hearing, did not indicate the sentence imposed upon Defendant was light or moderate. In fact, his actions indicated just the opposite. In light of fact nothing was indicated by trial judge about Defendant's sentence being a moderate sentence, there is no rationale to make a comparison.

B. The Government pre-sentence investigative report was reportedly relied on by the trial judge in imposing the original

sentence upon the Defendant. Defendant, through National Legal Services, recently corrected errors in the Government report and presented new information about the Defendant. Had this information been available at the time of original sentencing, and had the errors been corrected at that time, the sentence may have been less severe.

C. The alleged crime of defendant was not consumated. This fact was testified to by Ms. Marcia Shein of National Legal Services. Ms. Shein was accepted as an expert witness. She is a former Federal Probation Officer.

D. Defendant's sentence is not light or moderate. His only alleged co-defendant received simply a year and a day.

E. Defendant's mother, father and sister need him desperately at home. Their financial and physical condition is con-

tinuing to deteriorate beyond belief. This can be verified by members of the community. Court documents on file also attest to this fact. Furthermore, Defendant's only brother has a family of his own to support. His job requires him to travel and he resides in another state. Defendant on the other hand, is not married, and can live with his parents and sister and support and care for them.

F. Answer to U.S. Probation Officer's statistics, as pointed out in Point number Four, Section C of this motion, are further grounds for considering a reduction of sentence.

G. Court documents verify that Defendant was evaluated and tested by a prominent Georgia psychologist with the conclusion that Defendant was not a threat to himself or community. The alleged

allegation about a political assassination was presented to psychologist at time of his evaluation of Defendant.

H. Representative people from Defendant's hometown testified (some proffered) that Defendant was not a threat to the community.

I. There were no actual drugs or real drug organization involved in Defendant's alleged offense. Defendant spoke to no-one actually connected with drugs.

J. Defendant has made every effort, even with medical difficulties, to take all courses and programs required at Lexington. He has completed all of them in a satisfactory manner. Court documents verify this fact.

K. Defendant has offer of several good jobs if released. They provide an opportunity for Defendant to support his

APPENDIX E

mother, father and sister and also be a taxpayer. Job offers are already a part of Court record. Defendant also has an excellent educational background.

L. Community service at a retarded children's center, drug abuse center, or senior citizens center in Defendant's community on the week-end is an alternative to further incarceration of Defendant. It offers an excellent opportunity for Defendant to be a contributing member of society. Recent budget cuts have accelerated the need for volunteers.

Defendant respectfully prays that Court will re-consider his motion for reduction or modification of sentence.

Submitted this 16 day of November 1982.

/s/ Roscoe E. Dean, Jr.

Roscoe E. Dean, Jr.

APPENDIX L

P.O. Box 2000

Lexington, KY. 40511

U.S. District Court

Southern District of GA.

Filed in Office 8:32 A.M.

11-19-82

/s/ G. Hendrix

Deputy Clerk

APPENDIX E

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS DAY SERVED COUNSEL FOR ALL PARTIES IN THE FOREGOING MATTER WITH A COPY OF THIS PLEADING BY ADDRESSING SAME TO:

WILLIAM H. MCABEE
P.O. BOX 8999
SAVANNAH, GEORGIA 31412

RANDALL CLARK
P.O. BOX 1395
BRUNSWICK, GA 31521

AND DEPOSITING SAME IN THE U.S. MAIL WITH SUFFICIENT POSTAGE AFFIXED TO ASSURE DELIVERY.

THIS 17 DAY OF NOVEMBER 1982.

/s/ Roscoe E. Dean, Jr.
ROSCOE E. DEAN, JR.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

United States of America, Plaintiff	)	
vs	)	Case No. 480-13
Roscoe Emory Dean, Jr. Defendant	)	

MOTION FOR DISQUALIFICATION OF U.S. JUDGE ANTHONY ALAIMO UNDER 28 U.S.C. 455

Comes the defendant, Roscoe E. Dean, Jr., acting as his own counsel, and states his motion as follows:

1. That under 28 U.S.C. 455, paragraph (a) that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *(See second page for case references.)

2. That 28 U.S.C. 455, Note three, additionally states that "proper administration

of justice requires of judge not only actual impartiality but also appearance of detached impartiality." Texaco, Inc. vs Chandler, C.A. Okla. 1965, 354 F 2nd. 655; School District of Philadelphia vs. Harper and Row, Pub., D.C. Pa. 1967, 267 F. Supp. 1001.

3. That 28 U.S.C. 453 enumerates the oath that each federal judge takes before performing the duties of his office. It states: "I do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God."

APPENDIX F

4. That defendant by attached and sworn to affidavit enumerates events and actions that reasonably questions the impartiality and appearance of detached impartiality of U.S. Federal Judge Anthony Alaimo of the Southern District of Georgia. Affidavit is marked as Exhibit A. Attachment as Exhibit.

5. That motion for disqualification is timely because defendant was informed that Judge Alaimo was in the hospital recovering from surgery. Defendant now understands that said Judge may be in the process of resuming his court duties.

Therefore the Defendant prays the court as follows:

1. That U.S. Federal Judge Anthony Alaimo of the Southern District of Georgia disqualify himself in

APPENDIX F

Defendant's motion Thirty-Five now before the court.

/s/ Roscoe E. Dean, Jr.

Roscoe E. Dean, Jr.

Counsel for Self

I hereby state that a true and accurate copy of this motion and attachments has been mailed, U.S. postage prepaid, to Hon. Hinton Pierce, U.S. Attorney, Southern District of Georgia, Federal Courthouse, Savannah, Georgia, this 6th day of February 1984.

/s/ Roscoe E. Dean, Jr.

Roscoe E. Dean, Jr.

Counsel for Self

*Case References: U.S. vs Holland

655 FD 2nd. 44

U.S. vs. Conforte

457 FD. Supp. 644-653

U.S. vs. Ritter

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273 FD. 2nd. 30,32

Occidental Petroleum

Corp. vs Chandler

303 FD 2nd. 55,56

U.S. District Court

Southern District of GA.

Filed in Office

2-10-84

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Exhibit A

STATE OF KENTUCKY

COUNTY OF FAYETTE

I, Roscoe E. Dean, Jr., swear to and affirm that the following facts and events are true and correct to the best of my knowledge and belief:

1. I (Roscoe E. Dean, Jr.) served as state senator in the Georgia State Senate during the years 1965-1978. I served the Sixth District of Georgia which included a large part of Brunswick and Glynn County.

2. During one of my years of service as senator, the governor nominated a former law partner of Federal Judge Anthony Alaimo from Brunswick and Glynn County to the Board of Regents.

3. It was necessary for the Georgia State Senate to confirm such a nomination in order for it to be legal according to the State Constitution. As State Senator rep-

representing most of Glynn County, I opposed the nomination in the Senate and gave the reasons why.

4. During the time period of the consideration of the nomination by the Senate, a fellow senator approached me. He indicated to me that a federal judge wanted the Board of Regents nominee confirmed by the Senate. He indicated to me that I might want to consider "backing-off"! I told him I could not do so. In fact, I believe some of the news media at that time reported an item about a federal judge's possible involvement. The Senate, however, did not confirm the Board of Regents nominee but, unfortunately, it was a bitter and hard fought battle. The possibility and probability of strong ill feelings remains.

5. I (Roscoe E. Dean, Jr.) am willing to submit myself to a lie detector test,

administered by a qualified, experienced, ethical, independent polygraph examiner, designated by my attorney, to verify the truthfulness of the above statements and events.

6. Furthermore, U.S. Federal Judge Alaimo, before he was appointed judge, was involved in a political controversey against me as indicated by the attached newspaper article marked as Exhibit B.

7. In October 1982 U.S. Federal Judge Alaimo ruled on my motion thirty-five for reduction or modification of sentence, although he was not the trial judge in my case. He denied the motion. He also turned down my reconsideration motion on the issue. Adequate facts and information were presented to merit a strong consideration of a modification or reduction of my sentence. Additional new information about

APPENDIX F

me was presented to the court in the form of a supplemental report and appendix.

8. 28 U.S.C. 455, paragraph (a), states that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

9. 28 U.S.C. 455, Note three, states that "Proper administration of justice requires of judge not only actual impartiality but also appearance of detached impartiality". (Texaco, Inc. vs Chandler, C.A. Okla. 1965, 354 F.2nd, 655; School District of Philadelphia vs. Harper and Row, Pub., D.C. Pa. 1967, 267 F. Supp. 1001).

10. The above actions and events raise the reasonable question of Judge Anthony Alaimo's impartiality and appearance of detached impartiality. It is because of this and to enhance the public confidence in the impartiality of the judicial system that I

APPENDIX F

respectfully request that Judge Alaimo disqualify himself in my motion Thirty-Five now before the court.

/s/ Roscoe E. Dean, Jr.

Roscoe E. Dean, Jr.

04062-021

P. O. Box 2000 (ATW)

Lexington, Kentucky 40511

Sworn To and Subscribed

before me this 6th

day of February, 1984.

(Stamped as Case Manager,

U.S. Bureau of Prisons)

/s/ Robert H. Ebert

Notary Public

Fayette County

State of Kentucky

My Commission Expires:

N/A

APPENDIX F

EXHIBIT B

Savannah Morning News,

Thurs., Mar. 24, 1966 - 5A

Gayner of Brunswick

Highway Unit Member Plans

Query About Logan Transfer

Eighth District Georgia Highway Board member, E. J. Gayner of Brunswick said Wednesday "I intend to talk with several people" about the transfer of Jesup division Engineer E. A. Logan to Atlanta.

Georgia Chief Highway Engineer M. L. Shadburn had said Tuesday that Logan's transfer was brought about because he would not cooperate when Sen. Roscoe E. Dean, Jr. of Jesup wanted to control the hiring of state employees in the 28-county territory covered by the division office.

Brunswick's Gayner said he did not know why Logan had been transferred, and "so

far as I know he had been doing an excellent job."

Meanwhile, the tide of protest against the transfer rose. Several southeast Georgia legislators expressed puzzlement and criticism of the move.

Tuesday the Georgia Highway Department office in Atlanta admitted that they had been swamped with letters and telegrams of protest from county commissioners and legislators.

Gov. Carl Sanders insisted he had nothing to do with the transfer, and Highway Director Jim L. Gillis Sr., who earlier had mentioned the governor's office, denied that he had made such a statement.

Sen. Dean contacted in Jesup for the third consecutive day, again said he had no comment. Dean said he might have some comment if Logan returns to Jesup. The

APPENDIX F

official notification of the transfer, necessary under highway department rules, has not been written.

Chatham County Commission Chairman, Robert F. Lovett, Wednesday made available a copy of a letter he had written to Gov. Sanders about the reported transfer.

Lovett called the report "very disturbing" and added:

"In Chatham, we have enjoyed a very pleasant association with Mr. Logan, and we believe him to be a competent engineer, a thorough gentleman, and a credit to the Georgia Highway Department."

He continued that Logan "has been most cooperative in working for a solution to Chatham County's road problems."

"The purpose of this letter," Lovett said in the letter dated before the transfer was announced publicly in Atlanta, "is to

APPENDIX F

express...confidence...of the Chatham County commissioners in Mr. Logan in the event his critics should talk to you."

Sen. John M. Gayner of Brunswick, whose district includes five of the counties in the Jesup highway division territory, revealed Wednesday that two weeks ago he had learned Dean was "trying to get Mr. Logan fired."

Gayner declared that he talked with Gov. Sanders on March 15, and that the governor had commented, "John, you know how Senator Dean is. When he mounts a campaign he really gets busy."

Gayner insisted that Dean was trying to dictate hiring and firing in the area, and added that he could not "understand the governor's knuckling down under this kind of pressure."

Gayner said he will insist that Logan be

returned immediately. In the meantime, Vern D'Antignac, former assistant for construction, is acting as division engineer.

The fifth district senator said he would tell Gov. Sanders that "by yielding to pressure from Senator Dean, he has turned the highway department for all intents and purposes, over to" the Jesup senator.

Rep. Glenn Thomas of Wayne County, also a resident of Jesup, was contacted for comment, but said he had rather keep silent on the matter.

Rep. Alan B. Smith of Brunswick said, "I'm very much disturbed about it. (Sen. Dean) is trying to do the hiring and firing."

Glynn County Commission Chairman, Anthony A. Alaimo, said he would ask that Logan be returned immediately "unless they give us some satisfactory explanation."

Rep. Reid W. Harris of Brunswick said he

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did not think hiring and firing practices was "the function of a representative or senator."

Glynn Commission Chairman Alaimo said he recalled that before the last General Assembly session began Dean had indicated he would "ax" Logan and that Highway Director Gillis would be next.

A resolution adopted unanimously by the Glynn County Commission termed Logan "one of the most effective division engineers we have ever dealt with" and added that any transfer should have been made only after "officials of the counties served by the Jesup division (had been) informed or consulted..."

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA)

v. CR 480-13

ROSCOE EMORY DEAN, JR.)

RESPONSE TO MOTION FOR DISQUALIFICATION

Now comes the United States of America, by and through Hinton R. Pierce, United States Attorney for the Southern District of Georgia, and files this response to defendant's motion for disqualification and shows:

1.

The records of the Clerk's Office, Savannah Division, Southern District of Georgia, indicate Judge Edenfield is the Judge to whom this case is assigned.

Respectfully submitted,

HINTON R. PIERCE

APPENDIX F

UNITED STATES ATTORNEY

/s/ Wm. H. McAbee II

William H. McAbee II

Assistant United States Attorney

U.S. District Court

Southern District of GA.

Filed in Office

2-23-84

APPENDIX F

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Government's Response to Defendant's Motion for Disqualification has been mailed to Roscoe Dean, Jr., 04062-021, Post Office Box 2000 (ATW), Lexington, KY 40511, with postage affixed thereto.

This 23 day of February, 1984.

/s/Joseph Newman

Joseph D. Newman, AUSA

for

William H. McAbee II, AUSA

Post Office Box 8999

Savannah, GA 31412

BEST AVAIL

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA : CRIMINAL ACTION
V. :
ROSCOE EMORY DEAN, JR. : NO. 480-13

U.S. DISTRICT COURT
Southern District of GA.
Filed in office
5:40 P.M.
April 2 1984
/s/ B. Rowe
Deputy Clerk

O R D E R

The defendant, Roscoe Emory Dean, Jr., has submitted to the Court a motion styled "A Motion for Disqualification of U. S. Judge Anthony Alaimo Under 28 U.S.C. 455." Under §455(a):

LABLE COPY

APPENDIX F

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The provisions of §455 are self-activating; it is the duty of the judge to whom a case is assigned to examine all the circumstances of the case which might lead to an inference of partiality. United States v. Cerrella, 529 F.Supp. 1373, 1376 (S.D. Fla. 1982). If a reasonable man, under the circumstances adduced by the court, might question the objectivity of the judge, then he should recuse himself from the case. Id. at 1380.

Defendant Dean has suggested that recusal is proper in this instance because, while serving as a State Senator in 1966, he had been involved in a political contro-

versy in which he was opposed by then-Glynn County Commission Chairman Anthony Alaimo. The defendant is concerned that lingering tensions from that affair, now eighteen years past, will infect or appear to infect the judgment of this Court in its consideration of defendant's Rule 35 motion. The Court finds this argument implausible. No reasonable person would expect that a minor political squabble of local importance, so far removed in time from the present case, would in any way obscure the Court's clear and objective view of the issues before it. See generally United States v. Cerrella, 529 F.Supp. at 1380-81 (and cases cited therein).

Further, the record discloses that the sentence by the undersigned, after remand, was identical to that imposed by the original sentencing judge and, more impor-

tantly, has not been challenged.

Defendant's motion is hereby **DENIED.**

SO ORDERED, this 2nd day of April, 1984.

/s/ Anthony A. Alaimo

CHIEF JUDGE, UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

APPENDIX G

Mr. Spencer Mercer
Clerk of 11th Circuit Court of Appeals
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

My dear Mr. Mercer:

Please docket the enclosed letter and exhibits in Cases #84-8386 and 84-8475 (85-8035).

Enclosed are twenty-three copies of the letter and exhibits to be sent to all twelve active judges of the 11th Circuit Court of Appeals and the appropriate court staff. Under the circumstances it might be appropriate to also send a copy of the letter and exhibits to all five senior judges of the court.

The subject matter of the letter is urgent and very serious. I am sure I can count on your cooperation and timely response.

APPENDIX G

I am of this date acting as my own attorney. My former attorney has discharged all his duties and obligations in my behalf. Any and all matters relating to my cases should be sent to me. Thank you for your consideration.

Faithfully,

/s/ Roscoe Dean Jr.

Roscoe Dean, Jr.
612 Cherry Street
Jesup, Georgia 31545
912-427-2264

March 1, 1985

NOTE: The motion identified as Exhibit A and attached to the judge's letters is on legal size paper. It was filed and docketed with the U.S. Clerk of Court in Savannah, Georgia, on November 19, 1982, on legal size paper and they sent me a copy back

on the same size paper. I realize that your rules call for all petitions and, I suppose documents, to be on 8½ x 11 paper, but when the motion identified in Exhibit A was filed in 1982, this, I do not believe, was the rule. There is no way I can reduce the size of the motion exhibit from its original form without violating the integrity of the document. In light of this fact, I hope you will accept it as it was docketed with the court previously. Furthermore, the motion identified as Exhibit A is a crucial document and it is absolutely essential that it and all other exhibits accompany the judge's letters. Also one sheet in Exhibit B (newspaper clipping) was on legal size paper when it was

APPENDIX G

originally filed and remains so as a part of the exhibit now. I hope you will also accept this under the circumstances.

Thank you for your consideration of this matter.

R.D. Jr.

U.S. Court of Appeals
Eleventh Circuit
Filed March 4, 1985
Spencer Mercer, Clerk

APPENDIX G

(Excerpt from March 1, 1985
brief to Eleventh Circuit)

612 Cherry Street
Jesup, Georgia 31545

My dear Judge:

This letter is for the purpose of bringing to the attention of all twelve active judges of the Eleventh Circuit Court of Appeals (and possibly the five senior judges) a very serious matter and new information concerning my cases which were recently considered by the court and denied (January 17, 1985) and also my suggestion for an enbanc hearing which was recently considered by the entire court and denied (February 20, 1985). The case numbers are: 84-8386 and 84-8475 (85-8035). I present the following information:

1. The Government on June 8, 1984 and on August 3, 1984, presented to the 11th

APPENDIX G

Circuit Court of Appeals, for its consideration, briefs along with an appendix, pertaining to my cases, which appear to have been incomplete. They failed to include a timely filed motion by me entitled Motion for Reconsideration Amendment (Rule 35, Reduction of Sentence) docketed by the U.S. Clerk of Court of the Southern District of Georgia, Savannah, Georgia, on November 19, 1982. (The motion is attached as Exhibit A.) The Government not only failed to include the motion document in its appendix but it made no reference to it in its briefs. The Government on the other hand, did include in its appendix and mention in its briefs my denied Motion for Reduction of Sentence and my denied Motion for Reconsideration of Reduction of Sentence -- but not my motion entitled Motion for Reconsideration Amendment (Rule 35, Reduction of Sen-

tence) which was still alive and had great bearing on the first two motions.

2. The failure of the government to include this official document and comment on it appears to have allowed a decision to be rendered by the court based on incomplete information. The facts are as follows:

3. On September 1, 1982, a timely filed motion for Reduction of Sentence, pursuant to Rule 35, was filed in the U.S. Court for the Southern District of Georgia in my behalf. The motion for Reduction of Sentence was denied on October 22, 1982 by U.S. Judge Anthony Alaimo who was not the trial judge in my case and who was not intimately familiar with the evidence of my case. On November 1, 1982, a reconsideration motion for Reduction of Sentence was filed in my behalf and on the 15th of November, 1982, Judge Alaimo denied the reconsider-

ation motion. On November 16, 1982, I prepared a motion for reconsideration amendment (Rule 35, Reduction of Sentence) and it was timely filed and was docketed by the U.S. Clerk of Court of the Southern District of Georgia on November 19, 1982. (Exhibit A without attachments). The record shows that the motion for reconsideration amendment (Rule 35, Reduction of Sentence) was never acted on by Judge Alaimo. The record further shows that the motion for reconsideration amendment (Rule 35, Reduction of Sentence) was still pending before Judge Avant Edenfield released me from incarceration.

(The trial judge of my case who was intimately familiar with the evidence and who was also my original sentencing judge was U.S. Judge Avant Edenfield. Judge Edenfield had "stepped down from the bench" volun-

tarily and temporarily around December 1981 because of reported "so-called" alleged allegations being made against him by an individual by way of the U.S. Justice Department. The "so-called" allegations were not related to my case which had been tried earlier and was then on appeal. In the interim period Judge Anthony Alaimo assumed local control of my case and my motions for reduction of sentence. Judge Alaimo also re-sentenced me on a remand from the 11th Circuit Court of Appeals when the court directed that two of three counts I was convicted on be dismissed. The re-sentence was a routine administrative function since Judge Alaimo merely pronounced the same sentence on the one count that Judge Edenfield had earlier ordered on all three counts concurrently. Later, around November 1982, it is reported that Judge Edenfield

appeared as a witness in a Federal Court case in behalf of an attorney who at one time was associated with his former law firm. The attorney was found not guilty and Judge Edenfield was never indicted. In essence, Judge Edenfield was cleared of any and all "so-called" alleged allegations against him.)

4. On February 1, 1984, I filed a motion for correction of an illegal sentence under Rule 35(a). At the time of this filing my previous Rule 35 motion for reconsideration amendment (reduction of sentence) was still pending and alive. All of the above motions were filed with the Clerk of the U.S. Court in the Southern District of Georgia in Savannah, Georgia. I also filed on February 6, 1984, a motion and affidavit to disqualify Judge Anthony Alaimo from considering any additional

motions or actions in my case. (This action was not included in the government briefs or appendix either.) (Exhibit B) My case was re-assigned to Judge Edenfield, the original trial judge, although Judge Alaimo did not disqualify himself. Also Judge Alaimo did not address all the major issues raised in my disqualification motion and affidavit.

5. On April 5, 1984, Judge Avant Edenfield issued an order that released me from incarceration instanter pursuant to Rule 35. (Exhibit C) The wording of Judge Edenfield's order states that "the defendant had filed a motion to reconsider the denial of his motion pursuant to Rule 35 of the Federal rules of criminal procedure." The verbage of the judge's order did not say I had filed a Rule 35(a) motion to correct an illegal sentence. The verbage of the

judge's order did not say I had asked for reconsideration of a denied Rule 35(a) motion to correct an illegal sentence. It could not say this because at that point and time my motion to correct and illegal sentence had not been denied -- however my timely filed Rule 35 motion for reconsideration amendment (reduction of sentence) was still pending and alive. Furthermore, the verbage of the judge's order did not say that he released me on the grounds that the pre-sentence report submitted by the probation officer included an erroneous prediction of the guidelines the Parole Commission would apply. Furthermore, there is no proof in the language of the judge's order that he, ever in fact, acted on my February 1, 1984 motion to correct an illegal sentence. The language in his order strongly indicates however that he ruled on

APPENDIX G

my timely filed Rule 35 motion for reconsideration amendment (reduction of sentence) which was still pending and alive! (This fact was not presented earlier because the government failed to include in its documented appendix record my motion for reconsideration amendment (Rule 35 for reduction of sentence).

Furthermore, the timeliness of the judge's order is hardly an issue in light of the fact that:

I. My timely filed Rule 35 motion for reconsideration amendment (reduction of sentence) was simply just that - an amendment motion to the original motion 35 for reduction of sentence which had been filed within the required 120 days.

II. The case of U.S. vs. Rice, 671 Fd. 2d. (11th Circuit 1982) plainly states that a motion to reduce sentence that was

timely filed can be decided within "a reasonable time after the expiration of the 120 days in those rare circumstances in which (the District Court) is unable to decide the motion within the 120 day period." Additionally, U.S. vs. Mendoza, 581 Fd. 2d. (5th Circuit) enbanc adopting 565 F. 2d. (1978) is in accord that the reason for this exception to the 120 days jurisdictional time limit is that occasionally, through no fault of the defendant, the judge fails to rule on the motion to reduce within the 120 day period even though the motion was timely filed. In Mendoza the former Fifth Circuit recognized the defendant should not be penalized! (It should be pointed out that while the above two cases refer to a judge deciding the motions and that Judge Alaimo did in fact (decide) rule on two of my motions for reduction of sentence, he did not in fact rule

APPENDIX G

on my third motion for reduction of sentence--motion for reconsideration amendment- and by not doing so he kept the issue of reduction of sentence alive and still pending.) Also the issue of the impartiality and the appearance of detached impartiality on the part of Judge Alaimo when he ruled on my two motions for reduction of sentence and denied them. I addressed this in my motion and affidavit for his disqualification... Exhibit B).

III. The "rare circumstances" surrounding my case as referred to in U.S. vs. Rice are as follows:

A. The trial judge of my case (Judge Edenfield), who was intimately familiar with the evidence of my case and who was the original sentencing judge, "stepping down" from the bench voluntarily and temporarily because of "so-called" alleged allegations

against him which were later cleared up! (This was not the defendant's fault nor was it the fault of Judge Edenfield.)

B. The denial of my timely filed Rule 35 Reduction of Sentence motion and my reconsideration motion for reduction of sentence by Judge Alaimo who had assumed local control of my case after my conviction and appeals and who was not the trial judge of my case and who was not intimately familiar with the evidence of my case. Additionally, my motion for disqualification of Judge Alaimo who it appeared did not act impartially or give the appearance of detached impartiality in ruling on and denying my timely filed reduction of sentence motion and reconsideration motion for reduction of sentence. (The above action of a disqualification motion and affidavit was not included in the government's briefs or appendix

either.)

C. The government's action on June 8, 1984, and on August 3, 1984, when it presented to the 11th Circuit Court of Appeals, for its consideration, briefs along with an appendix, pertaining to my case, which appeared to be incomplete because it failed to include a timely filed Rule 35 motion by me entitled Motion For Reconsideration Amendment (Reduction of Sentence) docketed by the U.S. Clerk of Court for the Southern District of Georgia, Savannah, Georgia, on November 19, 1982. The government not only failed to include the document in its appendix but it made no reference to it in its briefs. The government, on the other hand, did include in its appendix and mention in its briefs my denied motion for reduction of sentence and my denied motion for reconsideration of reduction of sentence - but

not my third timely filed motion entitled Motion for Reconsideration Amendment (Reduction of Sentence) which was still alive and had great bearing on the first two motions.

D. The fact that the record shows that my timely filed Rule 35 Motion for Reconsideration Amendment (Reduction of Sentence) was never acted on by Judge Alaimo and was pending before trial Judge Edenfield released me from incarceration.

E. The fact that Judge Edenfield's order releasing me from incarceration does not contain any language that indicates that he acted on my Rule 35(a) motion to correct an illegal sentence or that he released me on the grounds that the pre-sentence report submitted by the probation officer included an erroneous prediction of the guidelines the Parole Commission would apply. The lan-

guage in Judge Edenfield's order however does strongly indicate that he ruled on my timely filed Rule 35 motion for reconsideration amendment (reduction of sentence) which was still pending and alive before he released me from incarceration. (This fact was not presented earlier because the government failed to include in its documented appendix record my Motion for Reconsideration Amendment (Rule 35 for reduction of sentence) and it also failed to refer to the motion in its briefs.)

The January 17, 1985 decision of the court in my cases on Page 19, Footnote 6, states that I had chosen to treat the District Court's order releasing me as one granting relief under Rule 35(a) --(Motion to correct an illegal sentence)! It should be kept in mind, however, that the government presented to the Court on June

APPENDIX G

8, 1984 and August 3, 1984, for its consideration, briefs along with an appendix, pertaining to my cases, that appear to be an incomplete record because it failed to include my timely filed Rule 35 Motion For Reconsideration Amendment (reduction of sentence) or refer to it. My replies and rebuttals were based, to a good extent, on the incomplete documented record the government presented. Furthermore, there are several thousand pages pertaining to my case and I do not possess a computer mind to recall every fact and document. Furthermore, it was the failure on the part of the government to include the above official document in the appendix record and comment on it in its briefs. Its failure to do so appears to have allowed a decision to be rendered by the court based on incomplete information.

APPENDIX G

Also the January 17, 1985 decision of the court in my cases on Page 19, Footnote 6, states that the 120 day limit applies even when the District Court purports to reconsider an earlier timely Rule 35(b) motion. There is a difference however, between reconsideration of a denied reconsideration motion (reduction of sentence) and considering for the first time a timely filed Rule 35 motion for reconsideration amendment (reduction of sentence) that had never been previously denied or acted on, was alive, and was pending as the facts indicate are true in my cases. Also, one must take into consideration the "rare circumstances" surrounding my cases which are outlined in this letter.

APPENDIX G

In light of the new information presented in this letter and the "rare circumstances" surrounding my cases, it is my sincere prayer that the court, in the interest of justice and fairness will re-review my cases and not reinstate my original sentence!

A large spectrum and cross-section of the law abiding citizens of our community and our area of the state have asked the question of what purpose will be served if I am returned to prison to serve out my original sentence? They ask this question based on the fact that I had already served nearly two years in prison before being released; that I have maintained an incident free record in the community for nearly a year since release; that I am not a threat to the community and have been fully ac-

cepted and welcomed back into society; that my release did not bring about any disrespect for law and order or justice; that my only alleged co-defendant had already been released going on three years. The attached letters (Exhibit D) concerning my status and the community are self-explanatory.

The decision of the court rendered in my cases and released on January 17, 1985 appear to be based on the premise that Judge Edenfield made an error in his April 5, 1984 order, which released me from incarceration. The reason of error given by the court appears to be that his order released me on the grounds that the pre-sentence report submitted by the probation officer included an erroneous prediction of the guidelines that the Parole Commission would apply and that since such was not a material fact it was not an illegal sentence

APPENDIX G

and therefore I was not legally released. However, in light of the new information presented in this letter and the fact that the government presented to the court what appears to be incomplete information; and the fact that Judge Edenfield's release order, in light of the new information, was not predicated on the premises as contended; and the "rare circumstances" surrounding the cases; then such developments certainly project a new and different perspective about the entire matter concerning the cases and their outcome. In light of the new information and developments, even if the government still maintains that Judge Edenfield erred in releasing me, it appears that he did not commit a gross abuse of discretion -- and there is a lot of difference between error and a gross abuse of discretion!

APPENDIX G

Faithfully,

/s/ Roscoe Dean Jr.

Roscoe Dean, Jr.

612 Cherry Street

Jesup, Georgia 31545

912-427-2264

March 1, 1985

P.S. I am acting as my own attorney in writing this letter. My former attorney has discharged all his duties in my behalf. Any and all matters relating to my cases should be sent to me at the following address: Roscoe Dean, Jr., 612 Cherry Street, Jesup, Georgia 31545, 912-427-2264.

cc: Clerk of 11th Circuit Court of Appeals

All Judges of 11th Circuit Court of Appeals

U.S. Attorney, Savannah, Georgia

APPENDIX G

Ms. Patty Stemler, U.S. Dept. of Justice

Judge Avant Edenfield

All above parties have been mailed a copy of this letter and exhibits with sufficient postage attached thereto on March 1, 1985.

/s/ R.D. Jr.

R. D. Jr.

U.S. Court of Appeals
Eleventh Circuit
Filed March 4, 1985
Spencer, Mercer, Clerk

APPENDIX H

My Spencer Mercer
Clerk of 11th Circuit Court of Appeals
50 Spring Street, S.W.
Atlanta, Georgia 30303-3147

My dear Mr. Mercer:

Please docket the enclosed letter and exhibits, dated April 15, 1985, in my cases #84-8386 and 84-8475 (85-8035).

Enclosed are twenty-one copies of the letter and exhibits to be sent to all twelve active judges of the 11th Circuit Court of Appeals and the court staff. Under the circumstances it might be appropriate to also send a copy of the letter and exhibits to all five senior judges of the court. <u>There are two enclosures for each judge -- the letter and the exhibits.</u>

The subject matter of this letter and exhibits is urgent and very serious. The

APPENDIX H

enclosed letter and exhibits are in reply to a response filed by the government on March 22, 1985, pertaining to my two cases. I originally wrote to the court on March 1, 1985, bringing to its attention a very serious matter and new information concerning my cases. The court on March 14, 1985, by letter, directed the government to respond. The enclosed letter and exhibits dated April 15, 1985, contain additional new information about my cases as a response to the government.

Each letter enclosed along with its exhibits, are personally addressed to each individual judge (all seventeen of them). I am sure I can count on your cooperation in seeing that each judge receives his personal letter and exhibits.

As I stated to you in my March 1, 1985 letter, I am acting as my own attorney in

APPENDIX H

THIS MATTER. Any and all matters relating to my cases should be sent to me at the address below. Thank you for your cooperation.

Faithfully,

/s/ Roscoe Dean, Jr.

Roscoe Dean, Jr.
612 Cherry Street
Jesup, Georgia 31545
912-427-2264

April 15, 1985

U.S. Court of Appeals
Eleventh Circuit
Filed April 16, 1985
Spencer Mercer, Clerk

APPENDIX H

(Excerpt from April 15, 1985
brief to the Eleventh Circuit.)

-Page 41-

events. They maintain also that I should not be rewarded for what they call negligence.

Some of the above statements on the part of the government are pure and simple speculation and do not merit a reply! Furthermore, the counsel for the government appears to forget the fact that there is no time limit on Truth! I did not appeal my release - the government did! It was their responsibility and duty to present to the court an accurate brief and appendix pertaining to my case. The record shows that they did not do so. They now attempt to justify their negligence by placing the blame on me. The court record shows however that government counsel declined to

APPENDIX H

order any transcripts pertaining to my case. On June 11, 1984, Exhibit V, government Counsel filed and appeal information sheet with the Eleventh Circuit Court of Appeals in which they state "no transcripts are being ordered." Yet government counsel admits on page seven of the government reply brief that "the docket sheet permanently records all past events" -- but yet they fail to request the docket record (transcripts) before they present the government's brief and appendix to the appeals court. The government counsel then states on page seven of the government reply brief that they were not asked to include the 1982 motion for reconsideration amendment in its appendix (and brief for that matter). Since when does one (defendant) have to ask the government to do so -- especially, in light of the fact, that they were the ones appealing my case and had

a responsibility and duty to present accurate information to the court at the start of the proceedings! As I stated in my March 1, 1985 letter to the court about this matter "my replies and rebuttals were based, to a good extent, on the incomplete documented record the government presented. Furthermore, there were several thousand pages pertaining to my case and I do not possess a computer mind to recall every fact and document. Furthermore, it was the failure on the part of the government to include the above official document (motion for Re-Consideration Amendment for Reduction of Sentence) in the appendix record and comment on it in its briefs. Its failure to do so appears to have allowed a decision to be rendered by the court based on incomplete information." The bottom line is that the government should not be rewarded for its

negligence!

It is my sincere and humble prayer, in light of the new information presented in this letter and by previous letter of March 1, 1985, that the appeals court in the interest of justice and fairness will re-review my case and not reinstate my original sentence! As stated before, a large spectrum and cross-section of the law abiding citizens of our community, and area of the state, have asked the question of what purpose will be served if I am returned to prison to serve out my original sentence? They ask the question based on the fact that I had already served nearly two years in prison before being released by my trial judge; that I have maintained an incident free record in the community for over a year since release; that I am not a threat to the community and have been fully accepted and

APPENDIX H

welcomed back into society; that my only alleged co-defendant has already been released going on three years; and that I have already been punished enough!

Faithfully,

/s/ Roscoe Dean, Jr.

Roscoe Dean, Jr.
612 Cherry Street
Jesup, Georgia 31545
912-427-2264

April 15, 1985

U.S. Court of Appeals
Eleventh Circuit
Filed April 16, 1985
Spencer Mercer, Clerk

APPENDIX I

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8386

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellent,

v.

ROSCOE EMORY DEAN, JR.,

Defendant-Appellee.

Appeal from the United States District Court

for the Southern District of Georgia

No. 85-8035

Non-Argument Calendar

APPENDIX I

IN RE: UNITED STATES OF AMERICA,

Petitioner.

On Petition for a Writ of Mandamus
to the United States District Court
for the Southern District of Georgia

(January 17, 1985)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

KRAVITCH, Circuit Judge:

U.S. Court of Appeals
Eleventh Circuit
Filed January 17, 1985
Spencer Mercer, Clerk

APPENDIX I

The defendant has filed a motion to reconsider the denial of his motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

After due consideration thereof, the sentence of confinement heretofore entered is modified to be limited to time already served by the defendant, and he is ordered released instanter. All other provisions of said sentence heretofore rendered are to remain in full force and effect.

SO ORDERED, this 5th day of April, 1984.

Dean has chosen on appeal to treat the district court's order as one granting relief under Rule 35(a). In any event, we note that the court could not properly have granted relief to Dean under Rule 35(b). The Supreme Court has held that the 120-

day time limit contained in Rule 35(b) is jurisdictional. United States v. Addonizio, 442 U.S. 178, 189, 99 S. Ct. 2235, 2242-43 (1979); accord, United States v. Rice, 671 F.2d 455, 459 (11th Cir. 1982); United States v. Norton, 539 F.2d 1082, 1083 (5th Cir.), cert. denied, 429 U.S. 1103 (1976); United States v. Mehrtens, 494 F.2d 1172 n.1 (5th Cir.), cert. denied, 419 U.S. 900 (1974). It is true that, if a motion to reduce sentence under Rule 35(b) is properly filed within the 120-day period, the district court retains jurisdiction for a "reasonable time" after the expiration of the 120 days "in those rare circumstances in which it is unable to decide the motion" within the 120-day period. See Rice, 671 F.2d at 459 n.5; United States v. Mendoza, 581 F. 2d 89, 90 (5th Cir. 1978) (en banc). This is not such a case, however, since Dean

has not alleged the existence of any "rare circumstances" warranting relief from the 120-day limit. See Rice, 671 F.2d at 459 n.5; Mehrtens, 494 F.2d at 1176.

We also note that the 120-day limit applies even where the district court purports to reconsider an earlier, timely Rule 35(b) motion. See Norton, 539 F.2d at 1083; see also United States v. Hetrick, 644 F.2d 752, 756 (9th Cir. 1981) ("Nor is the jurisdictional defect cured by styling the subsequent motion as a motion for reconsideration.").

7 No. 84-8386, filed May 2, 1984.

8 No. 84-8475, filed June 11, 1984.

9 28 U.S.C. § 1291 provides, in pertinent part:

The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the

APPENDIX I

United States, . . . except where a direct review may be had in the Supreme Court.

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U.S. Court of Appeals
Eleventh Circuit
Filed January 17, 1985
Spencer Mercer, Clerk

APPENDIX J

28 U.S.C.A. 455 (a) - (1985 cumulative annual pocket part, page 43, West Pub. Co., St. Paul, Minn.)

Disqualification of Justice, Judge or Magistrate

(A) Any Justice, Judge or Magistrate of the United States shall disqualify Himself in any proceeding in which his impartially might reasonably be questioned.

28 U.S.C.A. 455 (note three) - (1968 copyright, page 75, West Pub. Co., St. Paul, Minn.)

Impartiality

Proper administration of justice requires of judge not only actual impartiality but also appearance of detached impartiality. Texaco Inc. v Chandler, C.A. Okl. 1965, 354 F. 2d. 655, certiorari denied 86 S. CT. 1066, 383 U.S. 936, 15 L. Ed. 2d. 853. See also, School District of Philadelphia v Harper and Row Publishers, Inc. D.C. Pa. 1967 F. Supp. 1001.

APPENDIX J

28 U.S.C.A. 153 - (1968 copyright, page 72, West Pub. Co., St. Paul, Minn.)

Oaths of Justices and Judges

Each Justice and Judge of the United States shall take the following oath or affirmation before performing the duties of his office:

"I_____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as_____ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

28 U.S.C.A. 1254 (1) - (1966 copyright, page 49, West Pub. Co., St. Paul, Minn.)

Courts of Appeals; Certiorari; Appeal; Certified questions.

APPENDIX J

Cases in the Court of Appeals may be reviewed by the Supreme Court, by the following methods:

(1) By Writ of Certiorari, granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree.

Article XIV, U.S. Constitution, section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enformce any law which shall abridge the privileges or immunities of citizens of the united States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ROSCOE EMORY DEAN, JR.,

PETITIONER

V

UNITED STATES OF AMERICA,

RESPONDENT

AFFIDAVIT AND PROOF OF SERVICE

STATE OF KENTUCKY)
) ss.:
COUNTY OF FAYETTE)

ROSCOE EMORY DEAN, JR., after being duly sworn, deposes and says that he served this affidavit and proof of service, upon the counsels for the respondent, by enclosing a copy thereof, in an envelope, first class postage prepaid, addressed to:

1. Solicitor General of The U.S.
   Dept. Of Justice
   Washington, D.C. 20530

2. Ms. Patty Merkamp Stemler
   Appellate Section/Criminal Div.

2. Dept. Of Justice
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044-0899

3. U.S. Attorney
P.O. Box 8999
Savannah, Georgia 31412

and depositing same in the mailroom, at the Lexington, Kentucky, Federal Correctional Institution, on the 6th day of June, 1986.

That the counsels for respondent, are put on notice, by this affidavit and proof of service, that the affiant's revised PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, of which they were served a true and accurate copy, by U.S. Mail, first class postage prepaid, the 16th day of May, 1986, and which they did not return to affiant, is the exact same revised writ of certiorari, that affiant is remailing to the clerk's office of the U.S. Supreme Court, by depositing same in the mailroom (R & D), at Lexington, Kentucky, Federal Correctional Institution, this 6th day of June, 1986, first class postage prepaid.

Roscoe Emory Dean, Jr.

ROSCOE EMORY DEAN, JR., AFFIANT
04062-021
P.O. BOX 2000, (ATW)

LEXINGTON, KENTUCKY 40512

PRO SE

ROBERT H. EBERT, Case Manager
"Authorized by the Act of July 27, 1955
to administer oaths (18 U.S.C. 4004)."

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 6th
DAY OF JUNE, 1986.

Robert H Ebert

NOTARY PUBLIC
FAYETTE COUNTY
STATE OF KENTUCKY
MY COMMISSION EXPIRES:

N/A

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing petition for a writ of certiorari to the U. S. Court of Appeals for the Eleventh Circuit was served by U. S. mail, first class postage pre-paid, this 16th day of May, 1986, upon the following interested parties at the following addresses:

1. Solicitor General
   Department of Justice
   Washington, D.C. 20530

2. Ms. Patty Merkamp Stemler
   Appellate Section/Criminal Div.
   Department of Justice
   P.O. Box 899
   Ben Franklin Station
   Washington, D.C. 20044-0899

3. U.S. Attorney
   P.O. Box 8999
   Savannah, Georgia 31412

Roscoe E. Dean Jr. L.E.D.

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May 16th-1986

Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2054

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ROSCOE EMORY DEAN, JR.,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

ROSCOE E. DEAN, JR.
105 S.E. BROAD STREET
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COPY

The supplemental Appendix that follows is in response to a letter dated June 30, 1986, from Mr. Francis J. Lorson, Chief Deputy Clerk of the U.S. Supreme Court. Mr. Lorson informed petitioner that the opinion of the Eleventh Circuit U.S. Court of Appeals, in the case of United States Of America V. Roscoe E. Dean, Jr., Nos. 84-8386 and 85-8035 (84-8475), January 17, 1985, was not complete in petitioner's original appendix to his petition for a writ of certiorari. This supplemental appendix contains the full opinion, as requested by Mr. Lorson, and is in lieu of pages 19A-22A, APPENDIX C, of the original appendix, in petitioner's petition for a writ of certiorari, to the U.S. Court Of Appeals For The Eleventh Circuit, in the Supreme Court of the United States, October term 1985, Roscoe Emory Dean, Jr. Petitioner, V. United States of America, Respondent, case no. 85-2054. (On page three of the writ

of certiorari petition, lines thirteen and fourteen, and on page twelve of the petition, line eighteen, when it refers to Appendix C, pages 14A - 22A, it is in part now referring to the entire supplemental appendix, which is in lieu of pages 19A - 22A, of Appendix C, of the original appendix.) The appeals court opinion is typed exactly as it was issued by the appeals court with the footnotes following the opinion.

July 21, 1986

Roscoe E. Dean, Jr.

ROSCOE E. DEAN, JR.
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SUPPLEMENTAL APPENDIX

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8386

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellent,

v.

ROSCOE EMORY DEAN, JR.,

Defendant-Appellee.

Appeal from the United States District Court

for the Southern District of Georgia

No. 85-8035

Non-Argument Calendar

2A-SUPP.

APPENDIX C

N RE: United States of America,

Petitioner.

On Petition for a Writ of Mandamus
to the United States District Court
for the Southern District of Georgia

(January 17, 1985)

efore GODBOLD, Chief Judge, KRAVITCH and
ATCHETT, Circuit Judges.

KRAVITCH, Circuit Judge:

This case raises two important issues:
) Whether appeal or mandamus is the pro-
r remedy when the government alleges that
e district court has acted beyond the
ope of its lawful authority in reducing
e sentence of a convicted criminal de-
ndant; and (2) Whether the district court

may reduce a defendant's sentence under Rule 35 (a) of the Federal Rules of Criminal Procedure when the original sentence was based on an erroneous prediction concerning the amount of time the defendant would likely serve in prison prior to parole. After reviewing our prior decisions we conclude that (1) mandamus, not appeal, is the government's proper remedy, and (2) the district court lacked the authority to enter the order reducing the defendant's sentence under Rule 35 (a).

A. The Facts

The facts are largely undisputed. Roscoe Dean, a former Georgia state senator, was tried and convicted in the United States Dist. Court for the Southern District of Georgia on three counts of conspiracy to import co-

caine, marijuana, and methaqualone, in violation of 21 U.S.C. Sec. 956, 963.[1] In June, 1980, Dean was sentenced to concurrent five-year prison terms and fined $10,000 for each offense. On appeal, the former Fifth Circuit ruled that the evidence at trial showed the existence of only one conspiracy, not three, and remanded the case to the district court with instructions to vacate two of the three convictions and to resentence Dean. United States v. Dean, 666 F. 2d 174 (5th Cir. Unit B), cert. denied, 456 U.S. 1008 (1982). On April 16, 1982, Dean was resentenced by the district court to five years' imprisonment and a fine of $10,000.[2]

On September 15, 1982, Dean filed a motion for reduction of sentence under Rule 35 (b) of the Federal Rules of Criminal Procedure.[3] On October 22, the district court denied the motion. On November 1, Dean moved for re-

consideration; two weeks later, that motion likewise was denied.

On February 1, 1984, Dean filed a motion to correct an illegal sentence pursuant to Rule 35 (a).[4] In his motion, Dean alleged that the sentencing court had relied on an erroneous prediction by a probation officer concerning the length of time Dean would likely serve in prison prior to parole. The probation officer had predicted that, under the Parole Commission's guidelines, and assuming the imposition of a sentence of not more than nine years' imprisonment, Dean would likely serve between 24 and 36 months prior to parole. On July 14, 1983, however, the Parole Commission determined that Dean would not become eligible for parole until he had served 40 to 52 months of his five-year sentence.[5] On January 17, 1984, after an exchange of letters between

Dean, the district court, and the Parole Commission, the Commission affirmed its prior decision as to Dean's parole eligibility.

On April 5, 1984, the district court granted Dean's motion, "modified" Dean's sentence "to be limited to time already served by the defendant," and ordered Dean released from prison instanter.[6] The government filed a notice of appeal[7] and a petition for a writ of mandamus[8] on the grounds that the district court lacked the authority to reduce Dean's sentence. On June 27, a panel of this court denied without opinion the government's petition for a writ of mandamus. In re United States, No. 84-8475 (11th Cir. June 27, 1984) (unpublished order). Shortly thereafter, Dean filed a motion to dismiss the government's appeal for lack of jurisdiction. The gov-

ernment's memorandum in opposition to Dean's motion suggested that, in the event the court granted the motion to dismiss the appeal, the court should "reinstate" the government's petition for a writ of mandamus. The government subsequently filed motions to (1) consolidate the appeal with the previous mandamus action, (2) vacate the order denying the petition for a writ of mandamus, and (3) refile the petition for a writ of mandamus.

B. The Motion to Dismiss the Government's Appeal

In the motion to dismiss the government's appeal, Dean contends that this court lacks jurisdiction to hear the appeal because no statute permits the government to appeal a sentence modification order entered in a

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Rule 35 proceeding. The government, on the other hand, contends that the district court's order is appealable as a "final decision" under 28 U.S.C. Sec. 1291.[9]

This issue is controlled by the former Fifth Circuit decision in United States v. Denson, 588 F.2d 1112 (5th Cir.), aff'd in part and modified in part en banc, 603 F. 2d 1143 (5th Cir. 1979).[10] In Denson, the district court sentenced three defendants to terms of probation, despite the fact that the defendants had been convicted of offenses for which probation could not lawfully be imposed. The government filed a motion to correct the sentences. When the motion was denied, the government appealed.[11]

The former Fifth Circuit dismissed the government's appeal for lack of jurisdiction. The court first noted the long-established

rule that the government cannot appeal in a criminal case without the express authorization of Congress.

Denson, 588 F. 2d at 1125. The court then explained:

> [C]ertain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 U.S.C. Sec. 1291 . . . just as a civil litigation orders of equivalent distinctness are appealable on the same authority . . . .

Id. at 1126 (quoting Carroll v. United States 354 U.S. 394, 403, 77 S. Ct. 1332, 1338 (1956) (footnote omitted)). The court pointed out, however, that "[t]he Supreme Court [has] emphasized the rareness of such orders." Denson, 588 F. 2d at 1126. The court listed

the following factors to be used in determining the appealability of a district court's order under 28 U.S.C. Sec. 1291:

> The order appealed from must be severable from, and collateral to, the main case; the right involved must be so important that to deny review would be inappropriate; the issue presented must be such that postponing review until the final termination of the case would cause the irreparable loss of the valued right.

Id. (citation omitted). Applying these factors to the case before it, the court concluded that "[t]he sentencing process is the inevitable culmination of a successful prosecution; it is an integral aspect of a conviction." Id. (emphasis added). The court thus held that "the orders of sentence and probation are not possessed of 'sufficient independence' from the crim-

inal case to permit a Government appeal under 28 U.S.C. Sec. 1291," id. (citations omitted), and dismissed the government's appeal.[12]

The order in the instant case, like the one in Denson, fails to qualify as a "final order" under 28 U.S.C. Sec. 1291 because it is not "possessed of 'sufficient independence'" from the underlying criminal case. The government attempts to distinguish Denson on the grounds that Denson involved an appeal of the district court's original sentencing order, whereas here the government seeks to appeal an order modifying Dean's original sentence. We do not find this distinction significant. Under Denson, the entire "sentencing process" is "an integral aspect of a conviction." 588 F. 2d at 1126. In our view, both the original sentencing order and the modification order are

part of the "sentencing process" discussed in Denson. Hence we reject the government's contention that the modification order is "sufficiently independent" from the underlying criminal case to be appealable under 28 U.S.C. Sec. 1291, and we grant Dean's motion to dismiss the government's appeal.[13]

C. The Effect of the Prior Denial of the Government's Petition for a Writ of Mandamus

We will treat the government's three pending motions as a new petition for a writ of mandamus. Because another panel of this court previously denied an identical petition filed by the government, In re United States, No. 84-8475 (11th Cir. June 27, 1984) (unpublished order), we must decide whether the doctrines of res judicata or law of the case preclude us from reaching the merits

of the new petition.

In general, a prior decision will have res judicata effect only if it was a decision "on the merits." Lawlor v. National Screen Service Corporation, 349 U.S. 322, 326, 75 S. Ct. 865, 867 (1955); see generally 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure Sec. 4435 (1981).[14] Accordingly, a prior denial of a petition for a writ of mandamus will have res judicata effect only if the denial was "on the merits," but not if the denial was the result of the special limitations inherent in the writ:

> As to . . . more limited uses of extraordinary writs, on the other hand, preclusion ordinarily is inappropriate if the first decision was governed by curtailed procedures, discretionary grounds of decision, or special limits. . . . .

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> . . . Denial of a writ commonly rests on severe limitations of jurisdiction and discretion that prevent the court from applying ordinary tests of reversible error. If a decision is confined by these limitations, it should not preclude examination of the merits in later proceedings. Preclusion is appropriate only if denial rested on the merits of the questions presented rather than remedial limitations.

18 C. Wright, A. Miller & E. Cooper, supra, Sec. 4445 at pp. 393-94, 396-97 (footnotes omitted); see Heinemann Chemical Co. v. Heiner, 92 F. 2d 344, 346 (3d Cir. 1937) (denial of petition for writ of mandamus has no res judicata effect on later suit to recover taxes paid, because denial of petition was based on laches, not merits of controversy); cf. Hoffman v. Blaski, 363

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U.S. 335, 340 n.9, 80 S. Ct. 1084, 1088 n.9 (1960) (denial of leave to file petition for writ of mandamus has no res judicata effect on later petition for writ, in part because denial of leave was "not upon the merits"); Skil Corp. v. Millers Falls Co., 541 F 2d 554 (6th Cir.), cert. denied, 429 U.S. 1029 (1976) (denial on the merits of petition for writ of mandamus has res judicata effect).

Here, the prior denial of the government's petition was announced in a one-line, unpublished order. In re United States, No. 84-8475 (11th Cir. June 27, 1984) (unpublished order). The order does not provide us with a basis for determining the grounds on which the panel denied the petition. In this situation, we find persuasive the conclusion reached by the D.C. Circuit in United States v. Hubbard, 650 F. 2d 293 (D.C. Cir. 1980).

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In Hubbard, the Church of Scientology, a third party to a criminal case, had previously petitioned the appellate court for a writ of mandamus to prevent the district court from unsealing certain documents. The petition was denied without an opinion. In re Church of Scientology of California, No. 79-2318 (D.C. Cir. Nov. 21, 1979) (unpublished order). The Church then appealed the district court's order unsealing the documents. On appeal, the D.C. Circuit explained:

> Nevertheless, because of the writ's extraordinary nature, this court's earlier denial, without statement of reasons, of the Church's petition for mandamus . . . . has no bearing on our decision of these appeals.

Hubbard, 650 F. 2d at 310 n.62 (emphasis added; citations omitted); see also Hospes

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v. Burmite Div. of Whittaker Corp., 420 F. Supp. 806, 809 (S.D. Miss. 1976) (one-line denial of petition for writ of mandamus has no res judicata effect on later wrongful death action, because of inability to determine basis for denial and because mandamus is "extraordinary remedy" that is "reserved only for the most exceptional causes"). We adopt the rationale of Hubbard, and hold that, because we cannot determine the basis for the prior denial of the government's petition for a writ of mandamus, the denial does not have res judicata effect and does not prevent us from reaching the merits of the new petition.

Similarly, the law of the case doctrine does not prevent us from reaching the merits of the new petition. Although one aspect of the doctrine is that an appellate panel generally defers to a prior ruling in the

same case by another panel of the same court, see United States v. Burns, 662 F. 2d 1378, 1384 (11th Cir. 1981); Morrow v. Dillard, 580 F. 2d 1284, 1289-90 (5th Cir. 1978); see generally 18 C. Wright, A. Miller & E. Cooper, supra, Sec. 4478 at pp. 794-96, the doctrine applies only to issues that actually were decided in the prior proceeding, either expressly or by necessary implication. See Morrow, 580 F 2d at 1290. Thus, when the denial of a petition for a writ of mandamus is, or may be, the result of the special limitations inherent in the writ, such a denial does not establish the law of the case. See Connolly v. Pension Benefit Guaranty Corp., 673 F. 2d 1110, 1112-13 (9th Cir. 1982) ("We hold . . . that a summary denial of a petition for a writ of mandamus does not establish the law of the case."); 18 C. Wright, A. Miller & E. Cooper, supra,

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Sec. 4478 at p. 798 ("Rulings that simply deny extraordinary relief for want of a clear and strong showing on the merits . . . do not trigger law of the case consequences.").

Here, the government's previous petition for a writ of mandamus was summarily denied, perhaps on the grounds that the government's appeal was still pending rather than on the merits. See United States v. Denson, 603 F. 2d 1143, 1147 n.2 (5th Cir. 1979) (en banc) ("[A] court will not issue a writ of mandamus unless no other remedy is available. The lack of a remedy by appeal or in some other fashion is . . . a prerequisite to its issuance . . . . "). We therefore hold that, under the unique procedural circumstances of this case, the summary denial of the previous petition does not establish the law of the case and does not prevent us

from reaching the merits of the government's new petition.[15]

Dean contends that the government is guilty of laches because it did not attempt to contest the denial of the prior petition until November 5, 1984, more than four months after the entry of the order denying the petition. The government's explanation for this delay, however, is reasonable: Knowing that its appeal was still pending, the government justifiably assumed that the panel had denied the petition for a writ of mandamus on the grounds that appeal, not mandamus, was the proper remedy.

The instant case is distinguishable from United States v. Olds, 426 F. 2d 562 (3rd Cir. 1970), a sentence reduction case in which the court denied the government's petition for a writ of mandamus under the doctrine of laches. In Olds, the government

waited nearly three months before taking any steps to challenge the sentence reduction order. Here, by contrast, the government quickly and unequivocally challenged the order reducing Dean's sentence.[16] Because Dean could not have been misled about the government's intent to challenge the reduction of his sentence, Olds is inapposite.

This case is more closely analogous to the recent Third Circuit decision in United States v. Ferri, 686 F. 2d 147 (3d Cir. 1982), cert. denied, 459 U.S. 1211 (1983). In Ferri, the government filed a timely notice of appeal of a sentence reduction order, but did not file a petition for a writ of mandamus until almost three months later. The court ruled that mandamus was the proper remedy, and rejected the defendant's argument that the government was guilty of laches:

> [F]rom the outset, [the defendant] was put

> on notice that the government was challenging the reduction of his stntence. After filing its appeal, the government, being justifiably uncertain as to the proper procedural vehicle for review of an order reducing a criminal sentence, filed its petition for a writ of mandamus . . . . Thus, in view of the fact that in this case the government expeditiously appealed the order in question, we reject [the defendant's] contention that the government is guilty of laches with respect to its filing of the mandamus petition.

Id. at 153 (citation omitted).

We agree with the views expressed by the Third Circuit in Ferri, and we cannot say that the government acted unreasonably in the instant case. We therefore hold that the government was not guilty of laches in

contesting the denial of the prior petition for a writ of mandamus.

D. The New Petition for a Writ of Mandamus

Finally, we address the merits of the new peitition for a writ of mandamus. The government contends that the writ should issue because the district court lacked the authority under Rule 35 to reduce Dean's sentence and because mandamus is the proper remedy. Dean responds that the district court had the authority to "correct" the sentence under Rule 35 (a) because the sentence was originally entered on the basis of an erroneous material assumption about the length of time he would likely serve in prison prior to parole. Dean contends that, in view of this erroneous assumption, his original sentence violated the due process clause.

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Rule 35 (a) provides that "[t]he court may correct an illegal sentence at any time." Fed. R. Crim. P. 35 (a). The Supreme Court's decision in United States v. Addonizio, 442 U.S. 178, 99 S. Ct. 2235 (1979), however, completely forecloses Dean's argument that the sentence was "illegal" merely because the sentencing judge was mistaken about the length of time Dean would likely serve prior to parole.[17] In Addonizio, the Court explained:

> The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission. Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the

sentencing practices of individual judges. . . .

> The import of this statutory scheme is clear: the judge has no enforceable expectations with respect to the actual release of a sentenced defendant short of his statutory term. The judge may well have expectations as to when release is likely. But the actual decision is not his to make, either at the time of sentencing or later if his expectations are not met. . . . [W]e hold that subsequent actions taken by the Parole Commission -- whether or not such actions accord with a trial judge's expectations at the time of sentencing -- do not retroactively affect the validity of the final judgement itself.

Id. at 188-90, 99 S. Ct. at 2242-43 (emphasis added).

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The Court's message in Addonizio could not have been stated more clearly. A sentence is not "illegal" simply because the original sentencing judge mistakenly believed that the Parole Commission would release the defendant before the end of the defendant's full sentence. Whether the sentencing judge's belief was based on the judge's own knowledge of the parole system or on a prediction contained in the presentence report is irrelevant. The authority to determine whether a defendant will be released on parole is vested in the Parole Commission, not the sentencing judge. The sentencing judge may not use Rule 35 (a) as a means to usurp the authority of the Parole Commission.[18]

Dean argues that Addonizio involved a claim that the sentence was merely "illegal," whereas the instant case involves an alleged

violation of due process. We are unpersuaded by this imaginative attempt to distinguish Addonizio. A sentence that, under Addonizio, is not "illegal" can hardly rise to the level of a due process violation. Moreover, in Addonizio the Supreme Court concluded that the sentencing court's erroneous assumption about the defendant's parole eligibility did not constitute "misinformation" of constitutional magnitude"; the Court stated that "the proceeding was not infected with any error of fact or law of the 'fundamental' character that renders the entire proceeding irregular and invalid." Id. at 186, 99 S. Ct. at 2241.

The due process cases relied upon by Dean are completely inapposite. Those cases do indeed stand for the proposition that a sentencing court cannot rely on "false assumptions" without violating the due process

clause. See United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589 (1972); Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252 (1948); United States v. Baylin, 696 F. 2d 1030 (3d Cir. 1982); United States v. Tobias, 662 F. 2d 381 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982); United States v. Stein, 544 F. 2d 96 (2d Cir. 1976); United States v. Espinoza, 481 F. 2d 553 (5th Cir. 1973); United States v. Weston, 448 F. 2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); United States v. Malcolm, 432 F. 2d 809 (2d Cir. 1970). But the "false assumptions" in each of those cases related to a material fact, not a prediction about some future event. See Tucker, 404 U.S. at 447, 92 S. Ct. at 592 (defendant's prior criminal record); Townsend, 334 U.S. at 740-41, 68 S. Ct. at 1255 (defendant's prior criminal record); Baylin, 696 F. 2d at 1033-35 (defen-

dant's prior "illicit activities"); Tobias, 662 F. 2d at 388 (defendant's intent to man-

-continued next page-

ufacture large quantity of PCP; sentencing court may not rely on "incorrect assumptions from the evidence"); Stein, 544 F. 2d at 100 (defendant's attempt to "fix" prior sentence and defendant's feigned suicide to avoid going to jail); Espinoza, 481 F. 2d at 555 (defendant's "bad record"; sentencing court may not rely on erroneous "factual assumption"); Weston, 448 F. 2d at 633-34 (defendant's prior dealings in narcotics); Malcolm, 432 F. 2d at 816 (defendant's prior criminal record; sentencing court may not rely on "material false assumptions as to any facts"). We hold that Dean's original sentence, which was not imposed on the basis of erroneous assumptions about any material facts, did not violate the due process clause.[19]

Because the district court lacked the authority to reduce Dean's sentence under Rule 35 (a), we conclude that Dean's new sentence is unlawful. Our final inquiry concerns

whether mandamus is the government's proper remedy. It is axiomatic that mandamus is an "extraordinary remedy for extraordinary causes," United States v. Denson, 603 F. 2d 1143, 1146 (5th Cir. 1979) (en banc), and that the issuance of a writ of mandamus "lies in large part within the discretion of the court," id. Nevertheless, we have held that an appellate court is constrained within a "narrow scope of discretion" when a writ of mandamus is sought to correct an unlawful sentence imposed by a trial court. Id. at 1146-48. As stated in Denson:

> Absent the availability of mandamus, the limitation imposed by congress on the sentencing latitude accorded the trial court would go unheeded. The assumption of broad discretion by an appellat court in deciding whether or not to issue mandamus would be almost equivalent to granting

> the trial court the statutory authority denied it by congress. While relatively few cases have considered the problem in terms of principle, the Supreme Court and other appellate courts have responded to the application for the writ in such circumstances almost as if the applicant has a right to its issuance.

Id. at 1147. We therefore held that "if a district court exceeds the scope of its judicial authority, the aggrieved party should be granted the writ almost as a matter of right." Id. 20

We previously have issued writs of mandamus to compel district courts to vacate unauthorized sentence reduction orders. See, e.g., United States v. Norton, 539 F. 2d 1082, 1083 (5th Cir.), cert. denied, 429 U.S. 1103 (1976); United States v. Mehrtens, 494 F. 2d 1172, 1176 (5th Cir.), cert. denied,

419 U.S. 900 (1974).[21] Upon the authority of these cases, and applying the principles announced in Denson, we conclude that mandamus is the proper remedy in the instant case. We thus grant the government's petition for a writ of mandamus to compel the district court to vacate its order reducing Dean's sentence, and direct that the writ of mandamus issue.[22]

E. Conclusion

Based on the foregoing discussion, we GRANT (1) Dean's motion to dismiss the government's appeal, and (2) the government's petition for a writ of mandamus to compel the district court to reinstate the defendant's original sentence. The remaining motions are DENIED.

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APPEAL DISMISSED: WRIT OF MANDAMUS ORDERED TO ISSUE.

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1. The facts and circumstances of Dean's crime are not relevant to the issues before us. A recitation of those facts is contained in the opinion of the former Fifth Circuit on Dean's direct appeal from his conviction. See United States v. Dean, 666 F. 2d 174 (5th Cir. Unit B), cert. denied, 456 U.S. 1008 (1982).

2 The sentence imposed by the district court did not exceed the maximum sentence authorized by the statutes under which Dean was convicted.

3 Rule 35 (b) provides:

> (b) Reduction of Sentence. The court may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon af-

firmance of the judgement or dismissal of the appeal, or within 120 days after entry of any order or judgement of the Supreme Court denying review of, or having the effect of upholding, a judgement of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

Although Dean did not specify the subdivision of Rule 35 under which his September 15, 1982 motion was made, it is apparent from the content of the motion that Dean was requesting reduction of his sentence under Rule 35 (b), and not correction of an illegal sentence under Rule 35 (a).

4 Rule 35 (a) provides:

(a) Correction of Sentence. The court

may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

5 The Parole Commission's decision apparently was based on the Commission's view of the seriousness of Dean's crime. Dean does not challenge the validity of the Parole Commission's determination of his parole eligibility.

6 The district court entered the following order:

ORDER

Roscoe Emory Dean, Jr. was convicted, after a jury trial in this court, on May 14, 1980. His conviction was substantially affirmed by the Fifth Circuit Court of Appeals Unit B on January 22, 1982.

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The defendant has filed a motion to reconsider the denial of his motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

After due consideration thereof, the sentence of confinement heretofore entered is modified to be limited to time already served by the defendant, and he is ordered released instanter. All other provisions of said sentence heretofore rendered are to remain in full force and effect.

SO ORDERED, this 5th day of April, 1984.

Dean has chosen on appeal to treat the district court's order as one granting relief under Rule 35 (a). In any event, we note that the court could not properly have granted relief to Dean under Rule 35 (b). The Supreme Court has held that the 120-day time limit contained in Rule 35 (b) is jur-

isdictional. United States v. Addonizio, 442 U.S. 178, 189, 99 S. Ct. 2235, 2242-43 (1979); accord, United States v. Rice, 671 F. 2d 455, 459 (11th Cir. 1982); United States v. Norton, 539 F. 2d 1082, 1083 (5th Cir.), cert. denied, 429 U.S. 1103 (1976); United States v. Mehrtens, 494 F. 2d 1172, 1175 n.1 (5th Cir.), cert. denied, 419 U.S. 900 (1974). It is true that, if a motion to reduce sentence under Rule 35 (b) is properly filed within the 120-day period, the district court retains jurisdiction for a "reasonable time" after the expiration of the 120 days"in those rare circumstances in which it is unable to decide the motion" within the 120-day period. See Rice, 671 F. 2d at 459 n.5; United States v. Mendoza, 581 F. 2d 89, 90 (5th Cir. 1978) (en banc). This is not such a case, however, since Dean has not alleged the existence of any "rare

circumstances" warranting relief from the 120-day limit. See Rice, 671 F. 2d at 459 n.5; Mehrtens, 494 F. 2d at 1176.

We also note that the 120-day limit applies even where the district court purports to reconsider an earlier, timely Rule 35 (b) motion. See Norton, 539 F. 2d at 1083; see also United States v. Hetrick, 644 F. 2d 752, 756 (9th Cir. 1981) ("Nor is the jurisdictional defect cured by styling the subsequent 'motion as a motion for reconsideration.'").

7 No. 84-8386, filed May 2, 1984.

8 No. 84-8475, filed June 11, 1984.

9 28 U.S.C. Sec. 1291 provides, in pertinent part:

The courts of appeals . . . shall have

jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court.

10 The Eleventh Circuit in the en banc decision Bonner v. City of Prichard, 661 F. 2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

11 In Denson, as in the instant case, the government also filed a petition for a writ of mandamus under Rule 21 of the Federal Rules of Appellate Procedure. See infra note 21.

12 On rehearing en banc, the former Fifth Circuit affirmed and reinstated the portion of the panel opinion concerning the dismissal

of the government's appeal. Denson, 603 F. 2d at 1145.

The Denson panel opinion also discussed the Criminal Appeals Act, 18 U.S.C. Sec.3731, which enumerates certain instances in which the government may bring an appeal in a criminal case. Although 18 U.S.C. Sec. 3731 was enacted "to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit," United States v. Wilson, 420 U.S. 332, 337, 95 S. Ct. 1013, 1019 (1975), the court explained that the statute "cannot be construed to authorize a Government appeal from any and every District Court order." Denson, 588 F. 2d at 1125. The court concluded that the sentencing orders were "in no material way even related to the types of orders set out in Section 3731." Id. at 1126. The court therefore held that 18 U.S.C. Sec. 3731 did

not provide a statutory basis for the government's appeal. Id.; accord, United States v. Ferri, 686 F. 2d 147, 151 (3rd Cir. 1982), cert. denied, 459 U.S. 1211 (1983); United States v. DeMier, 671 F. 2d 1200, 1204 n.12 (8th Cir. 1982). Denson forecloses any possible contention that 18 U.S.C. Sec. 3731 authorizes a government appeal in the instant case.

13 The government cites United States v. Krohn, 700 F. 2d 1033 (5th Cir. 1983), for the proposition that, under 28 U.S.C. Sec. 1291, sentence reduction orders entered in Rule 35 proceedings are distinguishable from original sentencing orders. In Krohn,the current Fifth Circuit entertained the government's appeal from a sentence reduction order entered in a Rule 35 proceeding. Id. at 1035. The court did not discuss the ap-

pellate jurisdiction issue, however, nor did the court even mention Denson. We therefore decline to give precedential weight to Krohn on the appellate jurisdiction issue.

We acknowledge that at least three other circuits have ruled that the government may appeal sentence reduction orders entered under Rule 35. See United States v. DeMier, 671 F. 2d 1200 (8th Cir. 1982); United States v. United States District Court, 645 F. 2d 7 (6th Cir. 1981); United States v. Hetrick, 644 F. 2d 752 (9th Cir. 1981), modifying 627 F. 2d 1007 (9th Cir. 1980). We do not find these opinions persuasive. The Ninth Circuit's original opinion in Hetrick concluded that 28 U.S.C. Sec. 1291 provided the statutory basis for government appeals of sentence reduction orders, and that 18 U.S.C. Sec. 3731, which previously had been held not to permit govern-

ment appeals of such orders, did not preclude section 1291 jurisdiction. The court therefore held that the government may appeal such orders under section 1291. Hetrick,627 F. 2d at 1010. The court later modified its holding to state that the government may appeal such orders under section 3731. Hetrick, 644 F. 2d at 754. We find this modified holding to be inconsistent with the rest of the Hetrick opinion, and we decline to adopt the Ninth Circuit's position. The Sixth Circuit rested its decision solely on the original opinion in Hetrick, without even mentioning the amended opinion. United States v. United States District Court, 645 F. 2d at 8. Finally, the Eighth Circuit simply followed the Sixth Circuit. DeMier, 671 F. 2d at 1204.

14 One exception to this general rule is that a prior decision not "on the merits"

will have res judicata effect as to issues that were actually decided. See Acree v. Air Line Pilots Ass'n, 390 F. 2d 199, 203 (5th Cir.) (prior decision on jurisdictional grounds precludes further litigation of jurisdictional issue), cert. denied, 393 U.S. 852 (1968). This exception, however, is not applicable here.

15 We emphasize that our holding is based on the unique procedural circumstances of this case, and does not authorize generally the refiling of previously denied petitions for writ of mandamus. We express no opinion concerning whether, in general, the prior denial of a petition for a writ of mandamus may preclude a court from reaching the merits of a subsequent petition seeking the same remedy.

16 The government filed its appeal on May

2, 1984, less that one month after the entry of the sentence reduction order.

17 The facts in Addonizio were strikingly similar to those in the instant case. Addonizio, the former mayor of Newark, New Jersey, was convicted of conspiracy to comit extortion along with numerous substantive counts of extortion. He was sentenced to 10 years in prison. After serving 57 months, Addonizio received a hearing before the Parole Commission, but the Parole Commission denied him parole. The district court that had originally sentenced Addonizio then granted him relief under 28 U.S.C. Sec. 2255, a statute permitting collateral attack on a sentence "imposed in violation of the Constitution or laws of the United States." The district court stated that its decision to grant relief under 28 U.S.C. Sec. 2255 was based on

the court's frustrated expectation, at the time the original sentence was issued, that Addonizio would likely serve between three-and-one-half and four years in prison. The Third Circuit affirmed, Addonizio v. United States, 573 F. 2d 147 (3d Cir. 1978), but the Supreme Court reversed, United States v. Addonizio, 422 U.S. 178, 99 S. Ct. 2235 (1979).

18 We do not find it significant that Addonizio involved a challenge to the legality of the sentence under 28 U.S.C. Sec. 2255, whereas the instant case involves a Rule 35 (a) motion to correct an illegal sentence. Although the Supreme Court in Addonizio emphasized the limited scope of collateral attack on final judgements under section 2255, see 422 U.S. at 184-86, 99 S. Ct. at 2240-41, the Court's ultimate conclusion was that the decision of the Parole Commission "did not

affect the lawfulness of the judgement itself--then or now." Id. at 187, 99 S. Ct. at 2241.

19 In his Rule 35 motion, Dean relied heavily on the case of United States v. DeMier, 520 F. Supp. 1160 (W.D. Mo. 1981), aff'd, 671 F. 2d 1200 (8th Cir. 1982), for the proposition that a sentence imposed on the basis of erroneous information concerning Parole Commission guidelines violates the due process clause. We acknowledge that the district court's opinion in DeMier contains such language. Nevertheless, upon closer examination, it is apparent that the district court in DeMier ultimately granted the motion to reduce the defendant's sentence under Rule 35 (b), not Rule 35 (a). See DeMier, 671 F. 2d at 1204-08 (discussing whether the district court lacked jurisdiction over the Rule 35 motion

because the 120-day period expired prior to the granting of the motion). Therefore, De Mier is distinguishable from the instant case, and the district court's statements in DeMier concerning a possible due process violation must be viewed as dicta. In any event, we find the district court's due process language in DeMier wholly irreconcileable with the Supreme Court's opinion in Addonizio.

20 The panel opinion in Denson had previously indicated that mandamus was the proper remedy for an unlawful sentence. Nevertheless, the panel had declined to issue a writ of mandamus on the grounds that mandamus was an "extraordinary remedy" not warranted by the facts. Denson, 588 F. 2d at 1111-12 ("When we examine the facts in the instant case, we do not find a compelling need for the writ. Indeed, we find a more compelling case for declining to

exercise our discretion over the issuance of the writ.").

On rehearing en banc, the former Fifth Circuit acknowledged that "[d]iscretion might be inherent in the writ." Denson, 603 F. 2d at 1147. The court also noted, however, that [t]he scope of discretion is . . . circumscribed by the purpose for which the writ is sought. Under some circumstances the room for judgement is narrowly constrained." Id. at 1146. The court found itself "constrained by the narrow scope of discretion dictated by precedent," id. at 1148, and unpersuaded by the reasons given by the panel in support of its decision not to issue the writ. Therefore, the en banc court issued the writ of mandamus. Id. at 1149.

21 We also note that the Third Circuit has

recently held that mandamus, not appeal, is the proper remedy when a district court improperly grants an untimely motion for reduction of sentence under Rule 35 (b). See United States v. Ferri, 686 F. 2d 147 (3rd Cir. 1982), cert. denied, 459 U.S. 1211 (1983). The Ferri court held that "[s]uch an issue of judicial power falls squarely within the narrow range of cases for which mandamus is appropriate." Id. at 152.

22 As in Norton and Mehrtens, we find that formal issuance of the writ is not deemed necessary to assure the district court's compliance. A copy of this opinion issued as a mandate should suffice. See Norton, 539 F. 2d at 1083 n.2; Mehrtens, 494 F. 2d at 1176 n.2.

APPENDIX J

NOTE ON ERROR AND CORRECTION:

It should be brought to the court's attention that on page 231A of Appendix J, in the original appendix, there is an error on line one. It incorrectly reads as:

28 U.S.C.A. 153

The correct reading is:

28 U.S.C.A. 453

Please take note of this correction and change.

NO. 85-2054

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ROSCOE EMORY DEAN, JR.,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

AFFIDAVIT AND PROOF OF SERVICE

STATE OF GEORGIA)
) . ss.:
COUNTY OF WAYNE)

ROSCOE EMORY DEAN, JR., after being duly sworn, deposes and says that he served the within SUPPLEMENTAL APPENDIX, which is in lieu of pages 19A-22A, APPENDIX C, of his original appendix to his petition for a writ of certiorari to the U.S. Court of Appeals for the Eleventh Circuit, in the Supreme Court of the United States, October Term 1985, No. 85-2054, on counsel for the respondent by enclosing three copies thereof, in an envelope, first class postage prepaid, addressed to:

1. Solicitor General Of The U.S.
   Dept. of Justice

Washington, D.C. 20530

and depositing same in the Post Office, at Jesup, Georgia, on the 21 day of July, 1986.

Roscoe Emory Dean, Jr. LEI

ROSCOE EMORY DEAN, JR., AFFIANT

105 S.E. BROAD STREET

JESUP, GEORGIA 31545

PRO SE

SUBSCRIBED AND SWORN TO BEFORE ME THIS 21 DAY OF JULY, 1986.

Mary W. Jones

NOTARY PUBLIC

WAYNE COUNTY

STATE OF GEORGIA

MY COMMISSION EXPIRES:

Notary Public, Wayne County, Georgia
My Commission Expires Aug. 1, 1989